Supreme Court U.S.
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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

LUCKY STORES, INC. AND SUBSIDIARIES,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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158 pp

QUESTIONS PRESENTED

1. Whether taxpayers are entitled to rely upon Revenue Rulings of the Internal Revenue Service.

2. Whether a litigant with a government agency is deprived of due process of law when the agency falsely represents its relevant administrative history to the lower court, actively resists disclosure before the lower court and the court of appeals, then admits that its prior representations were false only after the case is fully submitted to the court of appeals.

PARTIES BELOW

The parties below consisted of petitioner-appellant Lucky Stores, Inc. and Subsidiaries and respondent-appellee Commissioner of Internal Revenue.

DISCLOSURE PURSUANT TO RULE 29.6

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, the petitioner-appellant Lucky Stores, Inc. states that the following is its only parent corporation, and it has no non-wholly owned subsidiaries:

American Stores Company

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW ii

DISCLOSURE PURSUANT TO RULE 29.6 ii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 7

I. THE NINTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS AND BY DENYING THE RIGHT OF TAXPAYERS TO RELY ON IRS REVENUE RULINGS ALLOWS THE IRS UNFAIRLY TO EXPLOIT THE ABSENCE OF DECISIONS BY THIS COURT ADDRESSING THE FORCE AND EFFECT OF REVENUE RULINGS 9

A. *Manhattan General* provides an answer only where the ruling is a nullity because it erroneously interprets a clear statute; this Revenue Ruling implements an ambiguous statute 9

B. The absence of decisions by this Court has led to a conflict between the circuits on the right to rely on Revenue Rulings, to conflict between the Tax Court and the circuits on the force and effect of Revenue Rulings, and to arbitrary IRS enforcement 12

TABLE OF CONTENTS – Continued

Page

II. THE NINTH CIRCUIT'S DECISION ALLOWS IRS MISCONDUCT, BY WHICH THE IRS FALSELY REPRESENTED ITS ADMINISTRATIVE HISTORY TO THE TAX COURT, ACTIVELY RESISTED DISCLOSURE BEFORE THE TAX COURT AND THE NINTH CIRCUIT, AND ADMITTED THAT ITS REPRESENTATIONS WERE "INCORRECT" ONLY AFTER THIS CASE WAS FULLY SUBMITTED TO THE NINTH CIRCUIT, TO DEPRIVE PETITIONER OF DUE PROCESS OF LAW IN THIS LITIGATION 17

CONCLUSION 19

APPENDIX

Appendix A: Opinion for the Court of Appeals for the Ninth Circuit .....App. 1

Appendix B: Opinion for the Tax Court...App. 10

Appendix C: Memo. Opinion for the Tax Court .....App. 34

Appendix D: Order of the Tax Court Denying Petitioner's Motion for Reconsideration and Requests for Judicial Notice .....App. 43

Appendix E: *Airborne Freight Corp. v. United States*, No. C95-301R, 1995 U.S. Dist. LEXIS 19822 (W.D. Wash. Nov. 7, 1995).....App. 44

Appendix F: Order of the Court of Appeals for the Ninth Circuit Denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.....App. 50

TABLE OF CONTENTS – Continued

		Page
Appendix G:	United States Constitution Fifth Amendment	App. 52
Appendix H:	26 U.S.C. § 404(a)(6) (1986)	App. 53
Appendix I:	26 U.S.C. § 7805 (1986)	App. 54
Appendix J:	Treasury Regulation § 601.601 (as amended in 1983)	App. 55
Appendix K:	Revenue Ruling 76-28	App. 63
Appendix L:*	Correspondence between counsel for Petitioner and counsel for Respondent from October 7, 1996 to December 18, 1996	App. 66
Appendix M:*	Correspondence between counsel for Petitioner and counsel for Respondent from September 15, 1997 to September 17, 1997	App. 80
Appendix N:*	Correspondence between counsel for Petitioner and counsel for Respondent from September 22, 1997 to September 26, 1997	App. 102

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* This Court may be requested to take judicial notice of correspondence between counsel for Petitioner and counsel for Respondent. Correspondence in Appendix L were the subject of such a request to the Ninth Circuit, except the letter of December 18, 1996. Judicial Notice Request to the Ninth Circuit filed September 18, 1997. Correspondence in Appendices M and N were the subject of such a request to the Tenth Circuit in *American Stores, Inc. and Subsidiaries*, 108 T.C. 178 (1997), *appeal docketed*, No. 97-9025 (10th Cir. Oct. 22, 1997).

TABLE OF CONTENTS – Continued

Page

Appendix O:* Letter to counsel for Respondent from counsel for Petitioner dated March 10, 1998 .....App. 125

Appendix P: Letter to the Ninth Circuit clerk from counsel for Respondent dated March 20, 1998 .....App. 127

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* This Court may be requested to take judicial notice of correspondence between counsel for Petitioner and counsel for Respondent. Correspondence in Appendix L were the subject of such a request to the Ninth Circuit, except the letter of December 18, 1996. Judicial Notice Request to the Ninth Circuit filed September 18, 1997. Correspondence in Appendices M and N were the subject of such a request to the Tenth Circuit in *American Stores, Inc. and Subsidiaries*, 108 T.C. 178 (1997), *appeal docketed*, No. 97-9025 (10th Cir. Oct. 22, 1997).

TABLE OF AUTHORITIES

Page

Federal Cases

Airborne Freight Corp. v. United States, No. C95-301R, 1995 U.S. Dist. LEXIS 19822 (W.D. Wash. Nov. 7, 1995) 12

Airborne Freight Corporation v. United States, 153 F.3d 967 (9th Cir. 1998) 6, 14

American Stores Co. and Subsidiaries v. Commissioner of Internal Revenue, 108 T.C. 178 (1997), *appeal docketed*, No. 97-9025 (10th Cir. Oct. 22, 1997) ..12, 14

Beneficial Foundation, Inc. v. United States, 8 Cl. Ct. 639 (1985) 14

Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984) 13

Commissioner of Internal Revenue v. Schleier, 515 U.S. 323 (1995) 9

Cottage Savings Association v. Commissioner of Internal Revenue, 499 U.S. 554 (1991) 16

Davis v. United States, 495 U.S. 472 (1990) 13, 19

Dillon, Read & Co., Inc. v. United States, 875 F.2d 293 (Fed. Cir. 1989) 14

Dixon v. United States, 381 U.S. 68 (1965) 16

Gonzales v. United States, 348 U.S. 407 (1955) 19

Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51 (1984) 15

International Business Machines Corp. v. United States, 343 F.2d 914 (Ct. Cl. 1965) 15

TABLE OF AUTHORITIES – Continued

Page

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 17

Local 144 Nursing Home Pension Fund v. Demisay, 508 U.S. 581 (1993) 10

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936) 10

Estate of McLendon v. Commissioner of Internal Revenue, 135 F.3d 1017 (5th Cir. 1998) 8, 13, 14, 15

Morgan v. United States, 304 U.S. 1 (1938) 19

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 17

Estate of Shapiro v. Commissioner of Internal Revenue, 111 F.3d 1010 (2d Cir. 1997) 16

Silco, Inc. v. United States, 779 F.2d 282 (5th Cir. 1986) 14

Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States, 129 F.3d 195 (D.C. Cir. 1997) 13

Travelers Ins. Co. v. United States, 35 Fed. Cl. 138 (1996) 14

United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973) 15

United States v. Kaiser, 363 U.S. 299 (1960) 16

CONSTITUTIONAL PROVISION

United States Constitution, Fifth Amendment 2, 17

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

26 U.S.C. § 404(a)(6) 2, 10, 11, 18

26 U.S.C. § 6213 4

26 U.S.C. § 7442 4

26 U.S.C. § 7805 ..... 2, 15, 17

28 U.S.C. § 1254(1) 1

TREASURY REGULATION

Treas. Reg. § 601.601(d) 2, 3, 16, 17

TREASURY PRONOUNCEMENTS

Revenue Ruling 54-172, § 12.06, 1954-1 C.B. 394 16

Revenue Ruling 76-28, 1976-1 C.B. 106 ..... 10, 13

1952-2 C.B. i 16

1953-1 C.B. 1 16

MISCELLANEOUS

Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 Tax Law. 675, 686 (1998) 13, 16

Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 Oh. St. L.J. 1037, 1042 (1995) 13

PETITION FOR A WRIT OF CERTIORARI

Lucky Stores, Inc. and Subsidiaries respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 153 F.3d 964 (9th Cir. 1998). The order of the court of appeals denying petitioner-appellant's petition for rehearing with suggestion for rehearing en banc is unreported but is included herein at Appendix ("App.") 50-51. The opinion of the Tax Court below is reported at 107 T.C. 1 (1996). The opinion of the Tax Court below denying petitioner-appellant's requests for judicial notice and motion for reconsideration is reported at T.C. Memo. 1997-70.

JURISDICTION

The court of appeals filed its opinion on August 20, 1998. Petitioner-appellant timely filed a petition for rehearing with suggestion for rehearing en banc on October 2, 1998, which subsequently was denied on November 12, 1998. App. 50-51. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. The Fifth Amendment to the United States Constitution, which provides, in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

2. 26 U.S.C. § 404(a)(6) (1986), which provides, in pertinent part:

> [A] taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

3. 26 U.S.C. § 7805 (1986), which provides, in pertinent part:

> (a) AUTHORIZATION. – Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.
>
> (b) RETROACTIVITY OF REGULATIONS OR RULINGS. – The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

4. Treas. Reg. § 601.601(d)(2)(v)*(d)* (as amended in 1983), which provides, in pertinent part:

> Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose.

5. Treas. Reg. § 601.601(d)(2)(v)*(e)* (as amended in 1983), which provides:

> Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings.

STATEMENT OF THE CASE

This case involves the right of taxpayers to rely upon Revenue Rulings of the Internal Revenue Service ("IRS"). It also involves the right to be free of government agency misconduct in litigation against that agency.

The Internal Revenue Code mandates the issuance of all needful rules and regulations for enforcement of the Code. A long-standing Regulation authorizes issuance of

Revenue Rulings. The Regulation provides that taxpayers are entitled to rely upon Revenue Rulings in the disposition of their cases.

The Internal Revenue Code also allows taxpayers to deduct contributions to retirement plans made after year-end but before the return filing date, if the contribution is "on account of" the prior year. This flexibility is widely utilized by employers.

In a 1976 Revenue Ruling, the IRS defined "on account of" to make the deduction of contributions elective in the case of contributions to defined benefit pension plans.

Petitioner-appellant ("Petitioner") made contributions to multiemployer defined benefit pension plans after the end of its 1986 tax year, and duly elected to claim deductions in its 1986 return. On audit, the IRS disallowed the deductions. The jurisdiction of the U.S. Tax Court was invoked pursuant to 26 U.S.C. § 6213 and 26 U.S.C. § 7442.

In the Tax Court, Petitioner relied upon the 1976 Revenue Ruling, pointing to IRS's own interpretations including technical advice memoranda. The IRS argued, *inter alia*, that Petitioner cannot rely upon the Revenue Ruling because it applies only to contributions to single employer plans and has no application to multiemployer plans.

In its reply brief in the Tax Court, when Petitioner had no opportunity to respond, the IRS characterized the

distinction between single employer plans and multiemployer plans as "pivotal" and "critical", then supported its argument by making representations to the Tax Court that its prior administrative pronouncements did not involve multiemployer plans. Excerpts of Record ("ER") 79, 93, 94, 104-108, 112, 118, 130-131, 142. Those representations were false.

The Tax Court accepted the IRS argument and rejected Petitioner's reliance on the Revenue Ruling. Petitioner filed a motion for reconsideration. Petitioner also filed motions for judicial notice establishing that the IRS representations to the Tax Court were false. Accompanying the motions were documents demonstrating the IRS administrative practice of applying the Revenue Ruling to allow deductions for multiemployer plan contributions.

Demands were made upon the IRS attorneys to disavow the false representations made to the Tax Court in view of the documents submitted with the motion for judicial notice. App. 66-79. The IRS did not dispute the genuineness of the documents, but opposed the motion for judicial notice and did not correct the false representations. Petitioner's motion for reconsideration was denied by the Tax Court, as were its motions for judicial notice, without opportunity to be heard.

Upon appeal to the Ninth Circuit, Petitioner argued that its reliance upon the Revenue Ruling was proper because Revenue Rulings are issued by the IRS pursuant to a Regulation stating that taxpayers are entitled to rely upon Revenue Rulings until revoked, the Revenue Ruling had not been revoked, and Petitioner's interpretation of

the Revenue Ruling was the interpretation employed by the IRS prior to this litigation.

Before the Ninth Circuit, Petitioner's motion for judicial notice was renewed and supplemented to again establish the twenty-year history of IRS's application of the Revenue Ruling to allow the deductions. Extensive documents, including many from the IRS's own files, were submitted demonstrating that the IRS knew that these deductions were "common" and "prevalent in the trucking industry." Those documents also showed, contrary to the representations made by the IRS to the Tax Court, that the prior technical advice memoranda applying the Revenue Ruling to allow deductions had involved multiemployer plans.

Petitioner was joined in its demands for candor by *amici curiae* in the case of *Airborne Freight Corp. v. United States*, 153 F.3d 967 (9th Cir. 1998), with which Petitioner was consolidated for argument in the Ninth Circuit. Prior to the commencement of briefing, demand again was made upon the IRS and the Department of Justice attorneys to correct the false representations made to the Tax Court and to acknowledge the IRS administrative history of applying the Revenue Ruling to contributions to multiemployer plans. App. 80-101. The IRS again did not contest the genuineness of the documents presented. But again the IRS did not concede the falsity of its prior representations.

Prior to the filing of the IRS's brief in the Ninth Circuit, additional demands for candor were directed to the IRS and its attorneys. App. 102-124. On brief, the IRS

attorneys did nothing to correct the false representations made to the Tax Court, and defended their characterization of the IRS administrative history. The IRS also filed an opposition to Petitioner's motion for judicial notice.

Prior to argument in the Ninth Circuit, additional demands were made to correct the false representations, and counsel's obligation of candor to the courts was again called to the attention of the IRS attorneys. App. 125-126. The false representations were not corrected at oral argument.

After the case was briefed, argued and fully submitted to the Ninth Circuit, the IRS responded. By letter to the court of appeals acknowledging that statements made to the court below were "incorrect", the IRS admitted that the administrative history set out in prior technical advice memoranda had in fact involved multiemployer plans. App. 127-130.

The Ninth Circuit sustained the Tax Court, accepting the IRS's new interpretation of the Revenue Ruling that it does not apply to multiemployer plan contributions. The opinion makes no mention of the IRS misrepresentations or misconduct. Petitioner filed a motion for rehearing with the suggestion the rehearing be heard en banc. The motion was denied.

REASONS FOR GRANTING THE PETITION

The absence of decisions by this Court addressing the force and effect of Revenue Rulings has created a vacuum

that has led to confusion in the lower courts and a conflict among the circuits. That vacuum is now fostering uneven and unfair administration of the federal income tax laws.

Recently, the IRS seems to be exploiting the vacuum by the practice of disavowing its outstanding unrevoked Revenue Rulings. The IRS is using the device of "reinterpreting" its Revenue Ruling in litigation when it does not like the result as to a particular taxpayer. The Fifth Circuit has dealt harshly with this, even rebuking the Tax Court for allowing such unfairness. *Estate of McLendon v. Commissioner of Internal Revenue*, 135 F.3d 1017, 1025 (5th Cir. 1998). The Ninth Circuit decision in this case is in direct conflict, accepting without discussion a new, revised IRS interpretation of the Revenue Ruling.

If the IRS is to be allowed the device of "reinterpretation", and taxpayers are not uniformly allowed to rely upon Revenue Rulings that are outstanding and unrevoked, consistency among identically situated taxpayers will be lost, confidence in the fairness of tax administration may suffer, and the integrity of the tax system may be called into question.

The Ninth Circuit has chosen to ignore patent IRS misconduct in this case, accepting without comment not only false representations to the Courts but a deliberate refusal to make timely correction. At the least, due process requires that litigation with the government be free of material misconduct by the government. The IRS should be held to no lesser standard. Absent action by this Court, the IRS may be emboldened to ignore the

standards of conduct that taxpayers should be entitled to expect from their government.

I. THE NINTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE CIRCUITS AND BY DENYING THE RIGHT OF TAXPAYERS TO RELY ON IRS REVENUE RULINGS ALLOWS THE IRS UNFAIRLY TO EXPLOIT THE ABSENCE OF DECISIONS BY THIS COURT ADDRESSING THE FORCE AND EFFECT OF REVENUE RULINGS.

This Court has not directly addressed taxpayers' right to rely on a Revenue Ruling issued to interpret an ambiguous statute. Nor has this Court considered the question in the modern era, in which Revenue Rulings since 1973 have been issued under a Treasury Regulation that expressly provides a right of taxpayer reliance. In recent years this Court has only reiterated general propositions, that "the Service's interpretive rulings do not have the force and effect of regulations" and "may not be used to overturn the plain language of a statute". *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323, 336 n.8 (1995) (citations omitted). The absence of decisions by this Court created the vacuum in which the IRS now appears.

A. *Manhattan General* provides an answer only where the ruling is a nullity because it erroneously interprets a clear statute; this Revenue Ruling implements an ambiguous statute.

This is not a case where an agency ruling conflicts with a clear statute and is a nullity under the doctrine of

Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936). The Ninth Circuit opinion did not rely on the *Manhattan General* doctrine. The reason is that the underlying statute, without interpretation, is both unworkable and inherently ambiguous. 26 U.S.C. § 404(a)(6).

Section 404(a)(6) was added to the Internal Revenue Code (the "Code") in 1974 to expand the deduction for post-year contributions from accrual basis taxpayers to all taxpayers, placing all employers on a modified cash basis for deducting contributions. It would defy the Congressional intention to apply this provision only to defined contribution plans and not defined benefit pension plans. No one has ever suggested that the provision does not apply to both kinds of qualified retirement plan.

Taken literally, section 404(a)(6) of the Code cannot apply to defined benefit pension plans. In such plans, contributions are not made "on account of" any year or employee. Instead, all contributions are pooled to pay all benefits. This is particularly true of multiemployer defined benefit pension plans, where the contributions of tens of thousands of employers are pooled to pay pensions to hundreds of thousands of employees, and contributions made in respect to one employee will go to benefit other employees, even employees of other employers. *See Local 144 Nursing Home Pension Fund v. Demisay*, 508 U.S. 581, 594 (1993) (Stevens, J., concurring).

The Revenue Ruling at issue, Revenue Ruling 76-28, 1976-1 C.B. 106, gave life to the statute and made it workable. By making "on account of" elective for defined benefit pension plans, it found a way for the section to

have meaning. Allowing taxpayers to choose the year "on account of" which such contributions are made has implemented the Congressional intention. It has also avoided the unintended result of creating a distinction between defined contribution plans and defined benefit plans where the statute makes none.

Section 404(a)(6) is also inherently ambiguous. It does not address the question, "on account of what?" Does "on account of" address employer contributions or employee benefits?

Multiemployer plan contributions well illustrate the ambiguity. Viewed from the standpoint of employer contributions, multiemployer plans resemble defined contribution plans. Contributions to multiemployer plans usually are measured by work done during the prior month and thus are attached to a period of time. Contributions to defined contribution plans such as profit sharing plans commonly are measured by compensation during the prior year, and likewise attach to a period of time. Viewed from the standpoint of contributions, "on account of" can have a simplistic, plain language, meaning.

But viewed from the other side of the mirror, the standpoint of employee benefits, the picture is opposite. Multiemployer defined benefit pension plans are identical to other defined benefit pension plans; all contributions are alike. They are pooled to pay benefits. In a defined benefit pension plan no contribution is attached to, or "on account of", anything. Instead, all contributions are treated in the same manner.

The disparate conclusions of the courts in this case underscore this ambiguity. The Ninth Circuit held that the Code language required the new IRS interpretation in this case to be sustained. App. 4. So did the Tax Court below, in the identical cases of Petitioner and its parent corporation. App. 32-33; *American Stores Co. and Subsidiaries v. Commissioner of Internal Revenue,* 108 T.C. 178 (1997). But the U.S. District Court below took the opposite view in the case later consolidated with this case for oral argument in the Ninth Circuit, sustaining Petitioner's interpretation. *Airborne Freight Corp. v. United States,* No. C95-301R, 1995 U.S. Dist. LEXIS 19822 (W.D. Wash. Nov. 7, 1995), *rev'd,* 153 F.3d 967 (9th Cir. 1998) (App. 46-47).

The IRS history over the years, evident now that the IRS has admitted the truth of its administrative history, also illustrates the ambiguity. The IRS adopted and applied Petitioner's interpretation of the Revenue Ruling, viewing the Code provision from the standpoint of employee benefits and allowing these deductions, for the first twenty years of the Revenue Ruling. In its litigating position in these cases, the IRS now advances a different interpretation.

B. The absence of decisions by this Court has led to a conflict between the circuits on the right to rely on Revenue Rulings, to conflict between the Tax Court and the circuits on the force and effect of Revenue Rulings, and to arbitrary IRS enforcement.

When speaking to the force and effect of Revenue Rulings, an important recent article stated the premise

that "[n]o decision of the Supreme Court has addressed the issue directly." *See* Benjamin J. Cohen & Catherine A. Harrington, *Is the Internal Revenue Service Bound by Its Own Regulations and Rulings?*, 51 TAX LAW. 675, 686 (1998).

Revenue Rulings have been described as the second most important interpretative pronouncement of the IRS. *Stichting Pensioenfonds Voor de Gezondheid, Geestelijke en Maatschappelijke Belangen v. United States*, 129 F.3d 195, 198 (D.C. Cir. 1997), *cert. denied*, – U.S. – (1998). The Revenue Ruling on which Petitioner relies was issued to provide rules where "guidelines are necessary pending the issuance of regulations." 1976-1 C.B. at 107. It is expressly a surrogate for regulations that have never been issued.

By reason of the vacuum left by the absence of decisions by this Court directly addressing the question, the Tax Court "has long been fighting a losing battle with the various courts of appeals over the proper deference to which revenue rulings are due". *Estate of McLendon*, 135 F.3d at 1023. In *Davis v. United States*, 495 U.S. 472 (1990), this Court might have applied to Revenue Rulings the view of deference to agency rulings set out in *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *rehearing denied*, 468 U.S. 1227 (1984), but did not. *See* Cohen & Harrington, 51 TAX LAW. at 687. One scholar has characterized the consequence of this vacuum as "a confusing and erratic judicial process," and observed "in recent years, the federal courts have aggressively embraced a variety of deference standards, which profoundly disturb traditional understandings of the role and weight of revenue rulings." Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OH. ST. L.J. 1037, 1042 (1995).

With respect to taxpayers' right to rely, there is now a direct conflict between the circuits. The Fifth Circuit has decided in favor of taxpayer reliance in *Estate of McLendon,* 135 F.3d 1017. The Ninth Circuit has declined to accept taxpayer reliance, in this case and the case consolidated for oral argument, *Airborne Freight Corp. v. United States,* 153 F.3d 967 (9th Cir. 1998). Prior decisions support reliance by taxpayers. *Dillon, Read & Co., Inc. v. United States,* 875 F.2d 293, 297-300 (Fed. Cir. 1989); *Silco, Inc. v. United States,* 779 F.2d 282, 287 (5th Cir. 1986); *Beneficial Foundation, Inc. v. United States,* 8 Cl. Ct. 639 (1985); *Travelers Ins. Co. v. United States,* 35 Fed. Cl. 138 (1996). Soon the Tenth Circuit will join one side or the other, in the case identical to this involving Petitioner's parent corporation, *American Stores Co. and Subsidiaries v. Commissioner of Internal Revenue,* 108 T.C. 178 (1997), *appeal docketed,* No. 97-9025 (10th Cir. Oct. 22, 1997).

Estate of McLendon was not fully argued to the Ninth Circuit below because it was decided after briefing was completed. In *Estate of McLendon,* decedent's estate claimed the right to use the IRS actuarial tables to value the sale of a remainder interest. A Revenue Ruling allowed use of the tables unless the possibility of survival for a year was so remote as to be negligible. The decedent had a ten percent chance to survive one year, thus met the test. The IRS sought to "reinterpret" its Revenue Ruling by reference to prior case law that had disregarded the actuarial tables where "significant evidence" of life expectancy overcame their presumptive correctness. Expressing exasperation at the Tax Court view that Revenue Rulings are no more than evidentiary, the Fifth Circuit held that "Because McLendon was entitled to rely on

Rev. Rul. 80-80, the Tax Court was not at liberty to disregard it." 135 F.2d at 1025.

The Ninth Circuit took the opposite view in this case. It accepted the new, revised IRS interpretation that multiemployer plan contributions do not meet the "treated in the same manner" test of the Revenue Ruling. It did so without discussion of the IRS administrative history reflecting the original and presumably intended interpretation of the IRS that for twenty years had allowed multiemployer pension plan contribution deductions.

One reason the absence of decisions by this Court addressing the force and effect of Revenue Rulings has created a vacuum is that the issue cannot be resolved by reference to decisions addressing the right of reliance on government agency rulings generally. There, the majority view seems to require a detrimental reliance to raise an estoppel or quasi-estoppel. *See, e.g., Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *United States Immigration and Naturalization Service v. Hibi*, 414 U.S. 5 (1973), *rehearing denied*, 414 U.S. 1104 (1973). The different right of taxpayers to rely on IRS rulings has been recognized to flow from section 7805 of the Internal Revenue Code. In addition to the mandate of section 7805(a) to provide needful regulations and rulings, section 7805(b) authorizes changes in rules and regulations to be made prospectively only. Implicit in this authorization is the power not to collect taxes otherwise required by the substantive taxing provisions, such that a taxpayer need not show any injury or detriment other than the payment of a tax the government should not retain. *International Business Machines Corp. v. United States*, 343 F.2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1996).

A major reason there is a vacuum as to the treatment of Revenue Rulings is that the older cases are no longer of any relevance. *See, e.g., Dixon v. United States*, 381 U.S. 68 (1965). Prior to 1953, Revenue Rulings were issued under a disclaimer that Revenue Rulings could not be relied upon. *See* 1952-2 C.B. i. In 1953 the IRS announced that Revenue Rulings may be cited and relied upon by taxpayers in the disposition of cases. 1953-1 C.B. 1. *See also* Rev. Rul. 54-172, § 12.06, 1954-1 C.B. 394, 401. The change was characterized by the Commissioner as "extremely important." *See generally*, Cohen & Harrington, 51 TAX LAW. at 685. The entitlement to rely on Revenue Rulings was then included in a Regulation in 1973, where it has remained since. Treas. Reg. § 601.601(d). Longstanding regulations take on the force of law. *Cottage Savings Ass'n v. Commissioner of Internal Revenue*, 499 U.S. 554, 560 (1991).

Allowing the IRS to dishonor its Revenue Rulings in litigation with taxpayers will give rise to an endless array of issue upon issue likely to plague the lower courts for years. Embedded in the tax law is the principle that the Commissioner "cannot tax one and not tax another without some rational basis for the difference". *United States v. Kaiser*, 363 U.S. 299, 308 (1960) (Frankfurter, J., concurring). Allowing the IRS to reinterpret its Revenue Rulings in litigation with a taxpayer does violence to this principle. Due process requires that taxpayers identically situated be treated the same, absent a rational basis for the distinction. *Id.* It is an abuse of discretion for the Commissioner to refrain from applying his Revenue Ruling to some taxpayers while others are allowed to rely on it. *See Estate of Shapiro v. Commissioner of Internal Revenue*, 111 F.3d 1010 (2d Cir. 1997), *cert. denied*, – U.S. – (1998).

Allowing the IRS to change its interpretation in secret, without process or notice of any kind, not only violates the IRS's own Regulation but thwarts the Code mechanism and deprives taxpayers of due process of law. 26 U.S.C. § 7805(b); Treas. Reg. § 601.601(d); *see Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 161-163 (1951) (Frankfurter, J., concurring).

II. THE NINTH CIRCUIT'S DECISION ALLOWS IRS MISCONDUCT, BY WHICH THE IRS FALSELY REPRESENTED ITS ADMINISTRATIVE HISTORY TO THE TAX COURT, ACTIVELY RESISTED DISCLOSURE BEFORE THE TAX COURT AND THE NINTH CIRCUIT, AND ADMITTED THAT ITS REPRESENTATIONS WERE "INCORRECT" ONLY AFTER THIS CASE WAS FULLY SUBMITTED TO THE NINTH CIRCUIT, TO DEPRIVE PETITIONER OF DUE PROCESS OF LAW IN THIS LITIGATION.

The Due Process Clause of the Fifth Amendment at a minimum requires that adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Petitioner was deprived of an appropriate opportunity for hearing because government agency misconduct compelled Petitioner to litigate the wrong case, diverting the attention of both Petitioner and the courts from the right one.

A careful reading of the extensive legislative history in the context of this litigation demonstrates that the Ninth Circuit was in error, and the IRS interpretation for the first twenty years of the Revenue Ruling was correct. The Congress was well aware that multiemployer plan contributions often hinge on formulas such as hours

worked or tons of coal mined, and chose not to so limit the benefit of section 404(a)(6). The Congress has taken great care to favor, and not to disadvantage, multi-employer plans. Brief for Petitioner, pp. 37, *et seq.*

From and after the time of the false representations made to the Tax Court in the IRS reply brief, Petitioner's principal attention had to be focused on establishing the falsity of the IRS mischaracterization of its administrative history. That history was central to Petitioner establishing its right to rely on the Revenue Ruling. The IRS itself had referred to the subject as "pivotal" and "critical." ER 79, 93, 104, 107, 108.

The IRS actively resisted efforts to establish that its representations to the courts were false, opposing Petitioner's motions for judicial notice in both the Tax Court and Ninth Circuit. This tactic worked to obscure from the courts the central issue of reliance on Revenue Rulings, reduced that issue to a secondary or contingent status, and diverted the courts' attention. This tactic also worked virtually to eliminate from consideration the complex but relevant legislative history.

The timing of the IRS's admission to the Ninth Circuit, made only after the case was fully submitted, meant that at no time during the litigation was there a full and fair opportunity to brief or argue the issue of reliance on Revenue Rulings. The only opportunity after the government admission was in Petitioner's motion for rehearing with the suggestion the motion be heard en banc. At best, that presents a severely limited opportunity to be heard.

The burden placed upon Petitioner, to extract the truth by requesting judicial notice of documents in the

IRS's own files, meant that the principal focus of briefing and argument throughout the appeal could not be the substantive issue and the relevant legislative history.

This Court has made clear that the full hearing to which litigants with government agencies are entitled also entitles them to litigate the right case, and not be misled into litigating the wrong one. *Gonzales v. United States*, 348 U.S. 407 (1955); *Morgan v. United States*, 304 U.S. 1 (1938), *rehearing denied*, 304 U.S. 1 (1938).

The Congress already has responded to its perception of IRS conduct in the IRS Restructuring and Reform Act of 1998. This Court should address that problem, and call that agency to account for its misconduct in this litigation by applying the due process standard to the IRS.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve a conflict among the circuits, to provide guidance to the lower courts as to the force and effect of Revenue Rulings, and to make due process standards applicable to litigating positions of the IRS.

Respectfully submitted,

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February 1999

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUCKY STORES, INC. AND SUBSIDIARIES, *Petitioner-Appellant,* v. COMMISSIONER OF INTERNAL REVENUE, *Respondent-Appellee.*	No. 97-70810 Tax Ct. No. 4446-93 OPINION

Appeal from a Decision of the
United States Tax Court
Arthur L. Nims, III, Tax Court Judge, Presiding

Argued and Submitted
March 12, 1998 – San Francisco, California

Filed August 20, 1998

Before: William C. Canby, Jr. and Stephen Reinhardt, Circuit Judges, and Jane A. Restani,[1] Judge, United States Court of International Trade

Opinion by Judge Canby

COUNSEL

Paul J. Sax, Orrick, Herrington, & Sutcliffe, L.L.P., San Francisco, California, for the petitioner-appellant.

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[1] The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

Steven W. Parks, United States Department of Justice, Tax Division, Washington, D. C., for the respondent-appellee.

OPINION

CANBY, Circuit Judge

This case requires us to interpret 26 U.S.C. § 404(a)(6), which concerns the timing of income tax deductions for contributions paid to multi-employer defined-benefit pension plans. Lucky Stores, Inc. ("Lucky") appeals the judgment of the Tax Court upholding the Commissioner's assessment of tax deficiencies. The Tax Court sustained the deficiencies because it concluded that Lucky had improperly deducted contributions to several defined-benefit pension plans that were paid after the end of the taxable year. *Lucky Stores, Inc. v. CIR*, 107 T.C. 1 (1996), *supplemented on denial of reconsideration*, T.C. Memo. 1997-70, 1997 WL 51211 (1997). We review de novo the Tax Court's conclusions of law, and review for clear error its factual findings. *See Condor Int'l, Inc. v. CIR*, 78 F.3d 1355, 1358 (9th Cir. 1996). We affirm the decision of the Tax Court.[2]

I

Pursuant to various collective bargaining agreements, Lucky paid monthly contributions to several qualified multi-employer defined-benefit pension plans

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[2] This case was argued along with *Airborne Freight Corp. v. United States*, No. 97-35129, ___ F.3d ___ (1998), which presents the identical issue, among others. The opinion in *Airborne* was filed simultaneously with this opinion.

("CBA plans") on behalf of its unionized employees. CBA plan administrators pooled contributions from the participating employers into a single fund to provide benefits for covered employees, former employees, and their beneficiaries. The amount of Lucky's required contributions varied from month to month, depending on fluctuations in the number of Lucky's covered employees and the total hours or weeks of service performed by those employees during each month.

II

In general, employers may deduct contributions to qualified pension plans in the taxable year during which the contribution is actually paid, regardless of whether the employer uses an accrual or a cash-basis method of accounting. *See* 26 U.S.C. § 404(a)(1); 26 C.F.R. § 1.404(a)-1(c). An exception to this rule provides that:

> a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

26 U.S.C. § 404(a)(6).

Prior to 1986, Lucky deducted a total of twelve monthly contributions attributable to employee service during a particular taxable year from its taxable income for that same year. The twelfth payment was made after the end of the taxable year, but was attributed to the previous year as a payment "on account of" that year pursuant to § 404(a)(6). Then, for its taxable year ending

on February 2, 1986, Lucky changed its practice. Lucky obtained an extension of time and filed its timely return on or about October 15, 1986. On that return, it attributed to the taxable year ending February 2, 1986, not only the monthly payments made later in February to the various CBA plans, but also the payments made each month thereafter up to October 1986. It did so on its claim that it was making these payments "on account of" the prior taxable year. Lucky thus sought to achieve a one-time benefit of the additional deductions of seven or eight months, added to the usual twelve.[3] The extra deductions totaled $36,661,529. It is these deductions that were disallowed by the Commissioner and the Tax Court.

III

The plain meaning of § 404(a)(6) supports the Tax Court's decision. The first payment that Lucky made after the end of the 1986 taxable year was clearly "on account of" that year because the payment was required under the collective bargaining agreements for hours worked by covered employees during the final month of the taxable year. The following seven or eight payments were required to be paid because of work done during the taxable year ending in 1987, not the previous year. The bare language of the statute precludes the deduction of those payments on the 1986 return.

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[3] The benefit was one-time, of course, because in the future Lucky could not, and did not, deduct payments for which a deduction had been claimed in an earlier year. Subsequent deductions were thus limited to twelve per taxable year.

Lucky's contention that it may deduct the additional payments in 1986 is based upon Revenue Ruling 76-28, which provides in pertinent part that, if the employer claims payments as deductions in the prior taxable year:

> [A] payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer. . . .

Rev. Rul. 76-28, 1976-1 C.B. 107.[4] Lucky insists that the last seven or eight payments that it attributed to the 1986 taxable year were necessarily treated the same as if they had been received on the last day of the 1986 taxable year, because the plans to which it contributes are all defined-benefit plans. A defined-benefit plan, unlike a defined-contribution plan, does not maintain individual accounts for each employee which require precise accounting for the date and amount of contribution. In the defined-benefit plans to which Lucky contributes, the worker's pension is calculated according to a formula based on years worked and highest salary maintained over a particular period. Because the employer's contribution has no direct relation to the workers' benefits, the contributions are simply placed in one common pool to fund the

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[4] Although revenue rulings do not have the force of law, they "do constitute a body of experience and informed judgment to which courts may properly resort for guidance in the interpretation of relevant revenue statutes and regulations." *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983).

entire plan. Thus, Lucky argues, all contributions are treated the same no matter when they are received. Its last seven or eight contributions are thus deductible, according to Lucky, under Rev. Rul. 76-28 because they were treated by the plan in the same manner as they would have been treated if received on the last day of the 1986 taxable year.

Where and how the money is deposited, however, reflects only one aspect of its treatment. In focusing solely on that factor, Lucky ignores the procedures that employers and administrators use to determine contribution amounts, as well as the process of accounting for contributions to ensure that employers keep pace with their obligations to the plans. The parties do not dispute the Tax Court's findings that, under the terms of the relevant collective bargaining agreements, Lucky was required to make contributions to the CBA plans near the end of each month. *Lucky Stores, Inc.*, 107 T.C. at 3. The amounts of the contributions were determined by the hours or weeks of employee service that were rendered during the immediately preceding month. *Id.* at 4. Plan administrators monitored the dates of receipt for the monthly contributions, and were empowered to levy interest charges and late fees on delinquent accounts. *Id.* at 5. Moreover, plan administrators were not prepared to process contributions that were in excess of the required amounts, and Lucky made no such advance contributions. *Id.* at 6. Plan administrators treated each remittance as the fulfillment of Lucky's required contribution for a discrete month. Thus the seven or eight contributions in issue were treated by the plans as payments satisfying Lucky's obligations in 1987, which is not the same as they

would have been treated if received on the last day of the 1986 taxable year. Lucky does not meet the requirement of Rev. Rul. 76-28.[5]

As the government points out, the Tax Court decision serves the purposes of § 404(a)(6). The original period of grace provided by that section was sixty days, which Congress later extended because of the difficulty taxpayers experienced in calculating the maximum deductible contribution for the expired taxable year. *See Don E. Williams Co. v. C.I.R.*, 429 U.S. 569, 575-76 (1977). For multi-employer plans, § 413(b)(7) provides that, for purposes of establishing the maximum deduction under § 404(a), the contributions of all employers shall be treated as made by a single employer. An employer's contribution is considered not to exceed the limit "if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan are determined) do not exceed such limitation." *Id.* As the government argues and the Tax Court recognized, plan administrators could not arrive at meaningful figures for

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[5] Lucky relies on several private letter rulings and one technical advice memorandum of the Internal Revenue Service as establishing a practice of the IRS permitting deductions such as those claimed by Lucky. Taxpayers other than those to whom such rulings or memoranda were issued are not entitled to rely on them. *See Norman Corp. v. District Director of Internal Revenue*, 446 F.2d 1374, 1375 (9th Cir. 1971); *Minchin v. Commissioner*, 335 F.2d 30, 32-33 (2d Cir. 1964); Rev. Proc. 90-2, 1990-1 Cum. Bull. 386, 398. Nor could the IRS establish a binding practice in conflict with § 404(a)(6).

anticipated contributions if employers were able to attribute to a taxable year payments based on work performed after that year. Lucky counters that the plan administrators' projections under § 413(b)(7) ought not to include payments "deemed" to be made during the taxable year, and that its allocation of extra payments to the taxable year therefore will not upset the scheme of § 413(b)(7). In our view, the government has the better of this argument. We need not rule on the issue, however, because we do not regard it as determinative. The reason that Lucky's additional payments were disallowed is not that they exceeded the calculated maximum allowable deduction for 1986; they were disallowed because they were not paid during the 1986 taxable year, as required by § 404(a)(1)(A), and they did not meet the conditions of § 404(a)(6) for an exception to that requirement. Lucky's disputed payments were not "on account of" its 1986 taxable year, and the Tax Court properly upheld their disallowance.

IV

Lucky asserts that the Tax Court abused its discretion in denying reconsideration. It does not support this contention with argument, and we reject it.

Lucky also contends that the Tax Court erred in rejecting its request to take judicial notice. We find no merit in the contention. The matter submitted by Lucky included non-noticeable material, *see* Fed. R. Evid. 201, and also included private letter rulings and technical advice memoranda upon which Lucky was not entitled to rely. *See* note 4, supra. The Tax Court considered and

rejected Lucky's written request; Lucky was not entitled to a formal hearing under Fed. R. Evid. 201. *See Allen v. Los Angeles*, 92 F.3d 842, 848 n.7 (9th Cir. 1996), *overruled on other grounds, Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997).

V

The judgment of the Tax Court is, in all respects, **AFFIRMED.**

APPENDIX B

FOR PUBLICATION

UNITED STATES TAX COURT

LUCKY STORES, INC., AND SUBSIDIARIES, PETITIONER *v.* COMMISSIIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 4446-93. Filed August 6, 1996.

Barry W. Homer, Eric W. Jorgensen, and Grady M. Bolding, for petitioner.

Alan Summers, Kevin G. Croke, and Elizabeth L. Groenewegen, for respondent.

NIMS, *Judge:* Respondent determined the following deficiencies in petitioner's Federal income tax:

FYE	*Deficiency*
Jan. 30, 1983	$ 8,797,328
Feb. 3, 1985	2,175,135
Feb. 2, 1986	48,255,017

Unless otherwise indicated, all section references are to sections of the Internal Revenue Code in effect for the years at issue, and all Rule references are to the Tax Court Rules of Practice and Procedure.

This case involves a number of issues. The only issue to be resolved in the present proceeding is petitioner's claim to a deduction for union-negotiated pension plan contributions for the taxable year ended February 2, 1986. The amount of the disputed deduction is $36,661,529.

Most of the facts have been stipulated and are so found.

Petitioner is a Delaware corporation. At the time the petition was filed, petitioner's principal place of business was located in Dublin, California.

FINDINGS OF FACT

At all relevant times, petitioner was subject to SEC public financial reporting and other requirements and, along with its subsidiaries, operated retail grocery stores located throughout California and Nevada. Petitioner requested and received from the Internal Revenue Service an extension to October 15, 1986 within which to file its U.S. consolidated corporate income tax return for the fiscal year ended February 2, 1986 (the Current Taxable Year). The return was timely filed.

Under applicable Internal Revenue Code provisions, employers are permitted to enter into "qualified" deferred compensation arrangements to provide retirement and other benefits to employees and their beneficiaries through single employer plans, multiple employer plans, and multiemployer plans. Plans that are not established or maintained pursuant to collective bargaining agreements are herein for convenience referred to as Multiple Employer Plans. Plans that are established and maintained pursuant to collective bargaining agreements are herein for convenience referred to as CBA Plans, or, on occasion, as "multiemployer pension plans". In both Multiple Employer Plans and CBA Plans, the contributions of the participating employers are pooled and used to provide the benefits of all the covered employees, former employees, and their beneficiaries. Section 413(b) contains certain rules exclusively applicable to CBA

Plans. Section 413(c) contains certain rules applicable to Multiple Employer Plans. The plans involved in this case are CBA Plans, subject to section 413(b).

Under single employer plans, only the employees and former employees of the single employer and their beneficiaries are eligible to receive retirement or other benefits under the plan. For this purpose, employers who are within a controlled group of entities, or under common control (all within the meaning of section 414(b) and (c)) are treated as a single employer for purposes of section 401.

At all relevant times, petitioner was required to and did contribute money to 29 CBA Plans. These plans were defined benefit pension plans. The following schedule sets forth the six largest of the CBA Plans to which petitioner made contributions (the Six Large CBA Plans) and their annual accounting periods (Plan Years) for Federal tax purposes:

CBA Plan	*Plan Year*
Northern California Retail Clerks Union and Food Employers Joint Pension Plan	1/1–12/31
California Butchers Pension Trust Fund	7/1–6/30
UFCW Midwest Pension Fund December	12/1–11/30
Western Conference of Teamsters	1/1–12/31
Central States SESW	1/1–12/31
Southern California UFCW	4/1–3/31

Contributions to each CBA Plan that were attributable to covered hours or weeks worked in a given month were due on the 20th of the month following the month

in which the hours were worked or compensated for. (The parties stipulated that contributions were due on the 30th of each month, but in her testimony Sandra Turpen, the administrator of the Northern California Retail Clerks' Employer Benefit Fund, gave the more precise statement of the due date for contributions.) An account was considered delinquent if the payment was not received by the last day of the month.

During the calendar years 1985, 1986, and 1987, more than one thousand employers made contributions to the CBA Plans on behalf of thousands of unionized employees and their beneficiaries. At all times between January 1, 1985 and December 31, 1987 (the relevant period), each of the CBA Plans qualified as a multi-employer pension plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) and was a plan to which section 413(b) and Subtitle E of Title IV of ERISA applied. At all times during the relevant period, each of the CBA Plans was qualified under section 401(a) as a pension plan and, accordingly, the trusts related to each CBA Plan were exempt from taxation under section 501.

As of the end of each month, petitioner calculated the amount that it was required to contribute to each CBA Plan attributable to covered hours or weeks worked during such month. Petitioner multiplied the number of hours or weeks of work in such month by covered employees times a monetary rate set by the collective bargaining agreement. Increases or decreases in the number of covered employees along with increases or decreases in the hours or weeks worked by covered employees required petitioner (and each of the other

contributing employers) to make a separate calculation for its required contribution to each Plan month by month.

For all taxable years ending before the Current Taxable Year, petitioner computed its deduction for contributions to the CBA Plans in the following manner: for each CBA Plan petitioner added the 12 monthly contribution amounts attributable to covered hours or weeks worked during a given taxable year and claimed that total amount as a deduction for that year. For every taxable year ending before the Current Taxable Year, the total amount claimed as a deduction for a taxable year did not include any contributions attributable to hours or weeks worked after the end of such year.

For its Current Taxable Year, petitioner computed its deduction for contributions to the CBA Plans claimed on its return in the following manner: petitioner added together the 12 monthly contribution amounts attributable to covered hours or weeks worked between February 3, 1985 and February 2, 1986, and also added the 8 monthly contributions attributable to covered hours or weeks worked from February 3 through August 31, 1986 and made before October 15, 1986 (the date on which petitioner filed its return for the Current Taxable Year). In addition, as to certain of the CBA Plans and bargaining units, the dates were February 3 through September 30, 1986, in which case there were nine monthly contributions instead of eight. Thus petitioner claimed a deduction for 19 – in some cases 20 – monthly contributions on the Current Taxable Year return.

For fiscal years ending after February 2, 1986, petitioner did not deduct any amounts which had been previously deducted on its Federal income tax return for any prior year. For fiscal years ending after February 2, 1986, petitioner claimed a deduction for no more than 12 monthly contributions in any such fiscal year. The record does not disclose the number of monthly contributions claimed by petitioner for deduction purposes on its Federal income tax return for the taxable year next succeeding the Current Taxable Year.

The $36,661,529 in dispute consists of $31,427,131 of contributions to the Six Large CBA Plans, and $5,234,398 to the 19 smaller plans. In the notice of deficiency, respondent did not disallow the 12 monthly contributions totaling $57,139,406 that petitioner made to the CBA Plans for hours or weeks worked by its covered employees in the Current Taxable Year and deducted on petitioner's return for the Current Taxable Year. The $57,139,406 consists of $48,395,987 of contributions to the Six Large CBA Plans and $8,743,419 to the 19 smaller plans. In addition, out of the total $96,890,058 deduction claimed by petitioner in the Current Taxable Year, respondent did not disallow $3,089,123 of contributions to certain profit-sharing plans.

Petitioner has never filed Form 3115 (Application for Change in Accounting Method) concerning the method it used to arrive at its deduction for contributions to the CBA Plans claimed on its return for the Current Taxable Year.

The administrator of each CBA Plan was a party independent of petitioner. The administrator of each CBA

Plan was appointed by the Board of Trustees of the Plan, one-half of whom are selected by the employers and the other one-half of whom are selected by the union locals. Under the terms of the collective bargaining agreements, the CBA Plans were entitled to collect interest and/or late fees on delinquent contributions from employers. At all times during the relevant periods, each CBA Plan administrator had in place procedures to monitor the actual dates of receipt of each contributing employer's required contribution.

As required by ERISA sections 104 and 4065 and sections 6057(b) and 6058(a), after the close of each plan year the administrator of each CBA Plan filed Annual Reports (Forms 5500) and accompanying schedules with the IRS. On Schedule B of Form 5500, each CBA Plan reported for each plan year only those contributions paid under the applicable collective bargaining agreement for hours or weeks worked during that particular plan year. Petitioner's monthly contributions to each CBA Plan were reported by each CBA Plan on Schedule B of Form 5500 for that plan year in which the related hours or weeks of the covered employees had been worked. Schedule B of Form 5500 is required to be filed only with respect to a defined benefit plan that is subject to the minimum funding standards of section 412 and ERISA section 302, 88 Stat. 869, and one purpose of the completion of the Schedule B is to demonstrate compliance or noncompliance with such minimum funding standards.

There was no provision in any of the collective bargaining agreements prohibiting petitioner from contributing more than the amount required under the agreements or contributing amounts in advance of the date that such

amounts became due. There was no provision in any of the collective bargaining agreements which explained how the plan administrator was supposed to handle or credit an amount received from an employer that was not earmarked as a contribution then due under the collective bargaining agreement. However, no contributions were made by petitioner to any of the CBA Plans during the relevant period that were not required by any relevant collective bargaining agreement. Petitioner, for public financial reporting purposes, accounted for its monthly contributions to the CBA Plans attributable to hours and weeks worked between February 3 and September 30, 1986 in its financial statements for its fiscal year immediately succeeding its fiscal year ended February 2, 1986.

The taxable year of a contributing employer need not be the same as the plan year of a CBA defined benefit pension plan to which such employer contributes. Administrators of CBA Plans are not required to know the taxable year adopted by contributing employers. Under the terms of the collective bargaining agreements, petitioner was not required to report to the plan administrators the deduction amounts it claimed for contributions.

At all times during the relevant periods, each of the CBA Plans met the minimum funding requirement of section 412 and ERISA section 302. In preparing its funding standard account under section 412 for each plan year, no CBA Plan actuary took into account contributions made by the contributing employers for hours worked by covered employees following such plan year. Under each of the CBA Plans for all relevant periods, the earning, crediting, and vesting of a participant's benefit

by the CBA Plan was independent of the making of any specific contribution by an employer.

The information recorded on Form 5500, Schedule B, for each of the Six Large Plans shows that each of the Six Large Plans had unfunded past service costs and that the actual contributions during the plan year, together with the credit balance in the funding standard account, exceeded the minimum funding requirement for the plan year. Therefore, section 404(a)(1)(A)(iii) was used to calculate the alternative limit for purposes of determining petitioner's entitlement to deduct its contributions to the CBA Plans.

For purposes of section 413(b)(7), the applicable limitation of section 404(a)(1)(A)(iii) with respect to contributions to each of the Six Large CBA Plans for the plan year of such CBA Plan that includes the date February 2, 1986, determined on a plan year basis and as if all participants were employed by a single employer, was as follows:

Plan Year Ended In Tax Year

	Deductible limit	*Contributions*[1]
California Butchers	$ 34,200,292	$ 23,905,300
N. Cal. Retail Clerks	92,985,762	78,946,374
S. Cal. UFCW	103,283,669	85,955,898
Central States SESW	957,945,930	664,202,000
UFCW M W Pension Plan	21,780,509	20,642,880
Western Conf./ Teamsters	567,476,801	478,491,232

Plan Your Begun in Tax Year

	Deductible limit	*Contributions*[1]
California Butchers	$ 31,210,926	$23,026,000
N. Cal. Retail Clerks	85,567,809	84,810,863
S. Cal. UFCW	103,071,886	92,593,714
Central States SESW	909,812,563	725,079,000
UFCW M W Pension Plan	22,500,268	21,053,791
Western Conf./ Teamsters	647,156,505	500,960,586

The amount of total employer contributions actually paid to each of the CBA Plans based on hours and weeks worked by eligible employees during each relevant plan year, as reported on Schedule B for such plan year, is an amount which, as of the beginning of such plan year, the CBA Plan administrator of such CBA Plan could have reasonably estimated or expected to be made by

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[1] Actual contributions during the plan year as recorded on the Form 5500, Schedule B.

employers with respect to hours and weeks worked by covered employees during such plan year.

Petitioner was never notified by any CBA Plan administrator or other CBA Plan representative that the statutory deduction limit was exceeded with respect to any CBA Plan for any relevant period. Petitioner did not notify any CBA Plan administrator or other CBA Plan representative that the monthly contributions attributable to hours and weeks worked after February 2, 1986 were to be applied to months ending on or before February 2, 1986.

For purposes of paying benefits and plan expenses, all contributions to each CBA Plan are pooled and no distinction is made between contributions for any specific time period or contributions made by any particular employer.

Petitioner consulted with the firm of Price Waterhouse regarding the acceleration of deductions for post-tax-yearend contributions to collectively bargained defined benefit pension plans. The parties stipulated that during the relevant period, Price Waterhouse was engaged in marketing that type of acceleration to certain clients and other employers that were making required contributions to multiemployer defined benefit pension plans.

By section 601(a) and (b)(1) of the Tax Reform Act of 1986, Pub.L. 99-514, 100 Stat. 2085, 2249, the top corporate tax rate was reduced from 46 percent to 34 percent for tax years beginning on or after July 1, 1987. See S.Rept. 99-313, at 219, 220-221 (1986) 1986-3 C.B. (Vol. 3) 1, 219, 220-221; H. Conf. Rept. 99-841 (Vol. 2), at II-59 (1986),

1986-3 C.B. (Vol. 4) 1, 59. Income in taxable years that included July 1, 1987 (other than as the first day of such year) was subject to blended rates. *Id.*

OPINION

During the relevant period, petitioner made monthly contributions to 29 CBA Plans on behalf of its unionized employees. For each CBA Plan, the amount of the monthly contribution was the arithmetical result obtained by multiplying the "covered hours worked" (the number of hours worked during the month by employees covered under the respective collective bargaining agreement (CBA)) by the "contribution rate", a dollar amount set forth in the CBA.

For any given taxable year prior to the Current Taxable Year, petitioner deducted the 12 monthly contributions that were calculated from covered hours worked during such year. Then, as to the Current Taxable Year, petitioner changed its method of calculating its deduction. For the Current Taxable Year, petitioner obtained an extension to October 15, 1986, of the time within which to file its return. Between the date on which the Current Taxable Year ended and the due date of the return, as extended, petitioner made eight or in some cases nine monthly contributions to the CBA Plans, and claimed these post-yearend contributions (herein for convenience called "grace period contributions") as a deduction for the Current Taxable Year, in addition to the usual 12 monthly contributions. As to the Current Taxable Year, respondent denied the deduction for the grace period contributions.

Petitioner claims that it is entitled to deduct the grace period contributions currently because they were "on account of" its Current Taxable Year within the meaning of section 404(a)(6), as explicated by Rev. Rul. 76-28, 1976-1 C.B. 106. In an unexpected burst of candor, petitioner admits that it is attempting to deduct, for the Current Taxable Year, "contributions made over a 20-month period".

While section 404(a)(1)(A) states that pension plan contributions are deductible "In the taxable year when paid", section 404(a)(6) provides a grace period in that, in the words of the section, "a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year", subject to the further condition that the payment be made "not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof)."

Petitioner also argues that under section 413(b)(7) its contributions were within the deductible limits of section 404(a) because the "anticipated contributions" for all the CBA Plans for their respective plan years did not exceed any maximum deduction limitation under section 404(a). Moreover, petitioner argues that the grace period contributions were "for the portion of" the Current Taxable Year that ended within the various plan years of the CBA Plans to which it made contributions, because under section 404(a)(6) they were deemed to have been a payment made on the last day of the Current Taxable Year.

Respondent presents several alternative arguments. First, respondent contends that petitioner's longstanding

practice of deducting only contributions calculated from covered hours worked during a given taxable year constituted an accounting method. In order to change to a different accounting method, petitioner was required under section 446(e) to obtain the Commissioner's consent, which was not done. Second, respondent asserts that petitioner's "new method", i.e., that of deducting grace period contributions in the Current Taxable Year, fails to clearly reflect income under section 446(b). And, third, respondent claims that the grace period contributions were not "on account of" petitioner's current tax year within the meaning of section 404(a)(6).

Section 404(a) specifies that employer contributions to exempt trusts under various types of qualified employee benefit plans are not deductible under any other Code provision, but if they would otherwise be deductible, they are deductible under section 404, subject to articulated limitations as to the amount deductible in any taxable year. The limitations on the amount deductible are contained in section 404(a)(1)(A), which also refers to the deduction of contributions "In the taxable year when paid". While section 404(a)(1)(A) provides the limits on the amount that may be deducted, it does not specify the method by which the actual amount of the deduction may be determined.

The applicable limitations on contributions to the CBA Plans in this case are contained in clauses (i) and (iii) of section 404(a)(1)(A), which, in combination, provide that the overall limitation is the greater of the amount necessary to satisfy the minimum funding standard of section 412(a) for plan years ending within the employer's taxable year, and an amount equal to the

normal cost of the plan, augmented by any amount necessary to amortize unfunded costs equally over 10 years.

In addition, the flush language at the end of subparagraph (A) of the foregoing section provides, among other things, that the maximum amount deductible for the taxable year is to be an amount equal to the *full* funding limitation for such year determined under section 412.

Section 404(a)(6) expands somewhat the time of payment provision at the beginning of section 404(a)(1)(A) by providing:

> (6) TIME WHEN CONTRIBUTIONS DEEMED MADE. – For purposes of paragraphs (1), (2), and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

As a further refinement of the section 404(a) limitations on the deductibility of contributions, section 413 provides certain rules that apply exclusively to "collectively bargained plans, etc." Section 413(a) provides that subsection (b) applies to any plan (and any trust thereunder) maintained pursuant to a CBA; i.e., a CBA Plan. Various paragraphs of subsection (b) provide rules that relate to CBA Plans, but the relevant paragraph for our present purposes is paragraph (7), which furnishes a road map for applying section 404(a) limitations insofar as they relate to CBA Plans. Section 413(b)(7) provides:

> (7) DEDUCTION LIMITATIONS. – Each applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were

> employed by a single employer. The amounts contributed to or under the plan by each employer who is a party to the agreement, for the portion of his taxable year which is included within such a plan year, shall be considered not to exceed such a limitation if the anticipated employer contributions for such plan year (determined in a manner consistent with the manner in which actual employer contributions for such plan year are determined) do not exceed such limitation. If such anticipated contributions exceed such a limitation, the portion of each such employer's contributions which is not deductible under section 404 shall be determined in accordance with regulations prescribed by the Secretary.

We think petitioner's attempt to use the expanded time of payment provision of section 404(a)(6), as augmented by section 413(b)(7), to enlarge its current contribution deduction is misguided.

The legislative history explains that the purpose of amending section 404(a)(6) was simply to place cash basis taxpayers on the same footing as accrual basis taxpayers insofar as contributions actually paid into the trust after the close of the taxable year are concerned. Before the amendment, only contributions by accrual basis taxpayers made by the time for filing tax returns could be treated as paid in the year for which a return was due. This allowed taxpayers sufficient time after the close of the taxable year to determine the amount of their contributions to be made to the plan. Section 404(a)(6) extends this flexibility to cash basis taxpayers. H. Rept. 93-807, at 101 (1974) 1974-3 C.B. (Supp.) 236, 336.

In addition, the conference report states that the intent of permitting grace period contributions is so that they may relate back to the plan year "for purposes of the minimum funding standards". H. Conf. Rept. 93-1280, at 290 (1974), 1974-3 C.B. 415, 451. There is nothing in the legislative history to suggest that Congress intended to expand the treatment of post-yearend payments beyond extending parity to cash basis taxpayers and making necessary calculations to determine the amount of the contribution.

Petitioner has the burden of proof in establishing that the contributions it seeks to deduct are, in the words of section 404(a)(6), "on account of" the current taxable year. Rule 142(a). In attempting to do this, petitioner places heavy emphasis upon words contained in Rev. Rul. 76-28, 1976-1 C.B. 106. Rev. Rul. 76-28, 1976-1 C.B. at 107, states that it "provides rules with respect to the application of section 404(a)(6) * * * in those areas where the Service has determined that guidelines are necessary pending the issuance of regulations." (We note that as of the date of this opinion, some 20 years later, regulations have still not been forthcoming.) Rev. Rul. 76-28 holds that

> a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year (or, in the case of a contribution by a partnership on behalf of a partner, the contribution is shown on schedule K of the partnership tax return for such year).

[1976-1 C.B. at 107.]

Revenue rulings are not ordinarily precedential in this Court. *Gordon v. Commissioner*, 88 T.C. 630, 635 (1987).—We need not dwell on the question of the weight to be afforded Rev. Rul. 76-28 in this case, however (see *Estate of Lang v. Commissioner*, 64 T.C. 404, 407 (1975), affd. in part and revd. in part on an unrelated issue 613 F.2d 770 (9th Cir. 1980)), because we believe that in any case petitioner has failed to prove that the payments in question were treated in the same manner that the CBA Plans would treat a payment actually received on the last day of the current taxable year.

Section 413(b)(7) prescribes the method for determining the parameters of the deduction limitations in the case of CBA Plans. Section 413(b)(7) provides that each applicable section 404(a) limitation is to be determined as if all participants in the plan are employed by a single employer. The amount contributed by each employer under a CBA Plan will not exceed the maximum deduction limitation if the *anticipated* employee contributions for the plan year are no greater than the limitation. H. Rept. 93-807, *supra* at 101, 1974-3 C.B. (Supp.) at 336.

Under section 413(b)(7), the anticipated employer contributions for a plan year are to be determined in a manner consistent with the manner in which *actual* employer contributions are determined.

We would repeat at this juncture that although sections 404(a)(1)(A) and 413(b)(7) establish outside limits on the amount that may be deducted in a given taxable year, these sections do not determine the amount of the deduction. Nevertheless, we think sections 404(a)(1)(A) and 413(b)(7) establish the approach to be taken to determine the amount of the actual deduction for contributions to CBA Plans.

In a case such as this, where a number of employers are contributing to any given plan – and here 29 different CBA Plans with differing plan years are involved – the computation of any contributing employer's total contribution deduction for a taxable year is obviously a very complex operation. But it stands to reason that the *anticipated* contributions from each employer must be based upon a 12-month year, and the subsequent contributions, and the consequent deductions, in order to be consistent as required by section 413(b)(7) must likewise be based upon a 12-month year. A taxpayer-employer such as petitioner may not unilaterally expand its deduction limitation, and increase the amount of its deduction, simply by including contributions in amounts that are inconsistent with anticipated employer contributions.

Furthermore, petitioner has not shown that its deduction as enhanced by the post-yearend contribution falls within the plan limits stipulated by the parties and reflected in our findings of fact. (The parties stipulated

that actual contributions during the plan year as recorded on Forms 5500, Schedule B, filed by the Six Large Plan Administrators, fall within the deductible limits.) Petitioner merely argues that the plan's computation of anticipated employer contributions is not concerned with the amount of the employer's deduction. But section 413(b)(7) requires that the computation of anticipated employer contributions must be consistent with actual employer contributions, and we believe that if such consistency is achieved, as in this case, then the actual contributions – those based on hours worked in the taxable year – determine the amount of the deduction.

Sandra Turpen, the Plan Administrator for the Northern California Retail Clerks' Employer Benefit Fund, testified that the minimum funding standard for the fund is calculated on a calendar year basis, by actuaries who base their calculations upon data furnished by the Fund. The Fund bills each employer on the first of each month, indicating the contribution rate applicable to that employer, and the employer in turn provides the Fund with a list of employees and hours worked, calculates the per hour rate times the hours worked, and makes its monthly contribution accordingly. As stated earlier, payments are due on the 20th of the month, and are deemed delinquent if not received by the end of the month.

Petitioner's Current Taxable Year ended February 2, 1986. It seems obvious that, except for delinquent payments on account of a preceding month in the taxable year, the only grace period contribution in this case that would be treated by the Northern California Retail Clerks' Employer Benefit Fund in the same manner that the Plan would treat a payment actually received on

February 2, 1986, would be the payment for hours worked in January, 1986, and which was due February 20, 1986. All monthly payments thereafter would be treated by the Plan as being related to hours worked in a tax year subsequent to the Current Taxable Year.

Petitioner complains that the administrative procedures of the Northern California Retail Clerks' Employer Benefit Fund, as described by Sandra Turpen, are not necessarily representative of the procedures of any other plan, and may not therefore be relied upon as the basis for finding facts except as to the Plan for which Ms. Turpen was the administrator. We find this argument disingenuous. Petitioner and respondent stipulated Ms. Turpen's deposition as a joint exhibit in lieu of testimony by Ms. Turpen at trial, without any reservation as to its use, or inferences to be drawn from it, whatsoever. Petitioner's purpose in stipulating the deposition is not apparent, if the testimony is not stipulated for the purpose of exemplifying the administrative procedures of all of the CBA Plans involved in this case. If petitioner considers the administration of Ms. Turpen's plan to be atypical, petitioner was free to introduce evidence as to how the other plans were administered, which petitioner chose not to do. We therefore reject petitioner's complaint about scope of the testimony.

Petitioner argues that respondent's position is inconsistent not only with Rev. Rul. 76-28, 1976-1 C.B. 106, but also with the administrative position taken in Technical Advice Memorandum 8210014 (TAM) and in a series of private letter rulings. Respondent points out that section 6110(j)(3) prohibits using or citing a written determination as a precedent, unless regulations provide otherwise,

which is not the case here. See *Estate of Jalkut v. Commissioner*, 96 T.C. 675, 684 (1991). Nevertheless, since the TAM appears to be the wellspring of petitioner's enhanced deduction claim, we deem it necessary to discuss it.

The TAM purports to apply Rev. Rul. 76-28 as it relates to section 404(a)(6) grace period contributions in defined contributions plan cases. As previously noted, Rev. Rul. 76-28 contains several tests (including one insignificant alternative) for determining whether grace period contributions may be deemed to have been made on the last day of the preceding taxable year. One of the tests, easily met, is that the employer must claim the contribution as a deduction on its tax return for the preceding taxable year.

The second test is that the plan must treat the contributions in the same manner as payments actually received on the last day of the preceding taxable year. The TAM nullifies this, the only really significant requirement of Rev. Rul. 76-28, by holding that since there is no specific linkage between contributions and benefits in a defined benefit plan, the requirement that the plan treat the contributions in the same manner as it would a contribution actually received on the last day of the preceding taxable year, is "meaningless".

Having thus seemingly emasculated Rev. Rul. 76-28 as it might otherwise apply to a vast number of employee benefit plans if the TAM were applied across the board, the TAM concludes, however, by saying that "This ruling does not consider the actual amounts deductible for

the * * * [relevant] taxable year." Petitioner does not mention this pronouncement.

Rev. Rul. 76-28 provides that a grace period contribution is to be considered "on account of" (the words of section 404(a)(6)) the preceding taxable year if the contribution is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year. The TAM states that "A contribution generally does not have any effect on the actual benefits payable to an employee." Petitioner argues that all contributions to each CBA Plan in this case were commingled with all other employers' contributions in a single undifferentiated pool and used to pay plan benefits and expenses without distinction as to when or by whom any contribution was made. Thus, reasons petitioner, it follows that any grace period contribution is treated by the plan in the same manner as the plan would treat a "last day" contribution.

We are not convinced that the absence of a contribution-benefit linkage establishes "same treatment", nor that the same treatment standard created by Rev. Rul. 76-28 is the only standard by which to measure the requirement of section 404(a)(6) that grace period contributions be "on account of" the relevant taxable year. We are, convinced, however, that petitioner may not arbitrarily expand the deductible limit for any taxable year by the simple expedient of including, in the taxable year's deduction, contributions based entirely upon hours worked by the plans's participants in a subsequent year.

Petitioner argues that respondent cannot change her longstanding administrative practice and apply the change on a retroactive basis. Respondent replies that the five private letter rulings, and possibly the TAM, relied on by petitioner relate to single employer, not multi-employer pension plans. In the former case, the single employer has flexibility in deciding how much and when to contribute, since there are no contractual provisions requiring the single employer to contribute pursuant to a formula at regular intervals. Petitioner's contributions, on the other hand, are, by contract, mechanical and predictable. Whether the private letter rulings, plus the TAM and Rev. Rul. 76-28, rise to the level of "longstanding administrative practice" is, to say the least, problematical, but in any event, as the Supreme Court has stated in *Dixon v. United States*, 381 U.S. 68, 73 (1965), Congress, and not the Commissioner, prescribes the tax laws, so that if indeed Rev. Rul. 76-28 and its ruling letter progeny are inconsistent with the thrust of section 404(a)(6), they must give way to the statute. See also *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-843 (1984).

We have considered petitioner's remaining arguments, which are basically variations on a theme, and find them equally unpersuasive.

We hold that petitioner's grace period contributions, except those that relate to hours worked in January, 1986, are not on account of petitioner's taxable year ended February 2, 1986, as required by section 404(a)(6), and are therefore not deductible in that year.

APPENDIX C

T.C. Memo. 1997-70

UNITED STATES TAX COURT

LUCKY STORES, INC., AND SUBSIDIARIES, Petitioner *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent*

Docket No. 4446-93. Filed February 10, 1997.

P filed a Motion for Reconsideration of our Opinion reported as *Lucky Stores, Inc., & Subs. v. Commissioner,* 107 T.C. 1 (1996) on the grounds that we failed to take into consideration R's long-standing administrative practice of applying Rev. Rul. 76-28, 1976-1 C.B. 106, to multiemployer defined benefit plans, and that R failed to fully and fairly apprise the court of respondent's actual practices and interpretations in this regard. In addition, P filed two Motions Requesting Judicial Notice. Held: P's Motion for Reconsideration and Motions Requesting Judicial Notice will be denied.

Paul J. Sax, Richard E.V. Harris, and *Richard A. Gilbert,* for petitioner.

Alan Summers, Kevin G. Croke, and *Elizabeth L. Groenewegen,* for respondent.

SUPPLEMENTAL MEMORANDUM OPINION

NIMS, *Judge:* In a timely filed Motion for Reconsideration (Motion) pursuant to Rule 161, petitioner

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* This opinion supplements our previously filed Opinion in *Lucky Stores, Inc., & Subs. v. Commissioner,* 107 T.C. 1 (1996).

requests the Court to reconsider its Opinion reported as *Lucky Stores, Inc., & Subs. v. Commissioner,* 107 T.C. 1 (1996). The Opinion is incorporated herein by this reference.

Except where otherwise noted, all Rule references are to the Tax Court Rules of Practice and Procedure. All section references are to sections of the Internal Revenue Code in effect for the years in issue.

Reconsideration under Rule 161 serves the limited purpose of correcting substantial errors of fact or law, and allows the introduction of newly discovered evidence that the moving party could not have introduced, by the exercise of due diligence, in the prior proceeding. *Westbrook v. Commissioner,* 68 F.3d 868, 879-880 (5th Cir. 1995), affg. per curiam T.C. Memo. 1993-634; see *Estate of Scanlan v. Commissioner,* T.C. Memo. 1996-414. The granting of a motion for reconsideration rests with the discretion of the Court, and we usually do not exercise our discretion in the absence of a showing of unusual circumstances or substantial error. *CWT Farms, Inc. v. Commissioner,* 79 T.C. 1054, 1057 (1982), affd. 755 F.2d 790 (11th Cir. 1985). Petitioner's Motion and related filings do not show any unusual circumstances or substantial error with respect to our Opinion.

In our Opinion, we held that petitioner may not deduct in a single taxable year contributions to 29 collectively bargained defined benefit plans made over a period of 20 (in some cases 19) months. In the Motion petitioner alleges that the Court erred in that this holding contradicts 20 years of administrative practice that applied Rev. Rul. 76-28, 1976-1 C.B. 106, to multiemployer

defined benefit plans. Petitioner's Motion also alleges that respondent's counsel misled the Court by not bringing to the Court's attention the history of respondent's actual practices and interpretations in this area.

In addition to the Motion, petitioner has also filed a Motion Requesting Judicial Notice and a Second Motion Requesting Judicial Notice (collectively Judicial Notice Motions) supported by two "Declarations" under penalty of perjury by Richard E.V. Harris, to which are attached numerous exhibits. The Declarations and attached exhibits have also been filed, and thus become a part of the record. They are accordingly referred to in this Supplemental Memorandum Opinion to the extent we deem it necessary to do so to address arguments contained in petitioner's Motion and Judicial Notice Motions.

Rule 201(f) of the Federal Rules of Evidence provides that judicial notice may be taken at any stage of the proceeding. Petitioner's Judicial Notice Motions will be denied in this case, however, because their many paragraphs constitute nothing more than a hodgepodge of argument and statements with respect to the alleged action or inaction of respondent's counsel, of other taxpayers, and of Congress, and with respect to collectively bargained multiemployer pension plans.

Unfortunately for petitioner's position is the overlooked central fact that section 404(a)(6), from which the disputed administrative pronouncements have flowed, is a *timing* provision, not a free-standing substantive provision intended to override other deduction provisions of section 404(a). Section 404 is entitled "DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN

EMPLOYEES' TRUST". Section 404(a)(6) is entitled "*Time* when contributions deemed made" (emphasis added).

The private rulings attached to petitioner's various filings all uniformly hold that post-yearend contributions (grade period contributions) to a qualified employees' benefit plan (including in some cases multiemployer plans), if made within the parameters spelled out in section 404(a)(6), may be deducted in the prior year, but *only if* they fall within the deduction limitations of section 404(a) and related subsections. Since petitioner's Motion and the Judicial Notice Motions never address this all-important proviso, petitioner's claim, even if correct, that respondent failed to alert the Court to the existence of multiemployer plan private rulings becomes wholly irrelevant.

The documents submitted with petitioner's Motion and Judicial Notice Motions themselves belie petitioner's argument that the result reached in our Opinion is at odds with respondent's long-standing administrative practice. This is amply illustrated by the following quotations:

> [1.] The rules contained in Rev. Rul. 76-28 regarding the application of Code section 404(a)(6) are *related only to the timing* of contributions for deduction purposes. * * * Corporation M is entitled to claim a deduction for such [1979] contribution *to the extent the deduction does not exceed the maximum deductible contribution for 1978.* [Priv. Ltr. Rul. 7945115, (Aug. 8, 1979); emphasis added.]
>
> [2.] You state that Corporation M makes contributions within the deduction limits

imposed by section 404(a)(1) and 404(a)(7) of the Code * * * . We conclude * * * that * * * Corporation M may deduct for 1979 and later taxable years under section 404(a)(1) and section 404(a)(6) of the Code contributions *Not in excess of the limits of section 404(a)(1) and section 404(a)(7)* * * * . [Priv. Ltr. Rul. 8010123 (Dec. 17, 1979); emphasis added.]

[3.] While the deductions also *must come within the limitations of I.R.C. section 404(a),* it is clear that those limits were not exceeded by the taxpayer. [Submission of a law firm in support of a ruling request; emphasis added.]

[4.] This ruling does not consider the actual amounts deductible for the 1977 taxable year. Undated Technical Advice Memorandum ruling involving years 1977-1978.

[5.] The total amount that may be deducted, however, is limited by the dollar amount determined under section 404(a)(1)(A) of the Code. [Tech. Adv. Mem. 8714008 (Dec. 17, 1986).]

[6.] In addition, the principles of Rev. Rul. 76-28, regarding the application of section 404(a)(6), are related *only to the timing of contributions* for deduction purposes and do not affect the computation of the plan's deductible limit under section 404(a). [Tech. Adv. Mem. 8714008 (Dec. 17, 1986); emphasis added.]

[7.] However, the principles contained in Rev. Rul. 76-28 regarding the application of section 404(a)(6) are *related only to the timing of contributions* for deduction purposes and do not affect the computation of the plan's deductible

limit under section 404(a). [Tech. adv. Mem. 8543002 (April 30, 1985); emphasis added.]

In short, the materials proffered by petitioner, to support its argument that the Court's Opinion is inconsistent with respondent's long-standing administrative position regarding section 404(a)(6) and Rev. Rul. 76-28, in fact wholly support the rationale of our Opinion and the result reached therein. In this connection, it may also be useful to note that in our Opinion we pointed out that Technical Advice Memorandum 8210014, upon which petitioner so strongly relied, itself flatly states that "this ruling does not consider the actual amounts deductible for the * * * [relevant] taxable year". *Lucky Stores, Inc. & Subs. v. Commissioner*, 107 T.C. at 16. In all of its moving papers, petitioner simply ignores these constantly repeated caveats, so it is difficult to give credence to petitioner's insistence that the Court has disregarded long-standing administrative practice. Deduction limitations and petitioner's failure to come within them are at the focal point of our Opinion.

Even in the absence of the foregoing, as we stated in our Opinion, revenue rulings are not ordinarily precedential in this Court. *Id.* at 13 (citing *Gordon v. Commissioner*, 88 T.C. 630, 635 (1987)). Moreover, unless the Secretary establishes otherwise by regulations, a "written determination" may not be used or cited as precedent by another taxpayer. Sec. 6110(j)(3); sec. 301.6110-7(b), Proced. & Admin. Regs. Written determinations include both private rulings and technical advice memoranda such as those excerpted above. Sec. 301.6110-2(a), Proced. & Admin. Regs.

As to the actual merits of the case, section 413(b)(7) provides that "Each applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were employed by a single employer." Section 413(b)(7) also provides that anticipated employer contributions are to be determined in a manner consistent with the manner in which actual contributions are determined.

In the prior proceeding petitioner argued that under section 413(b)(7) its contributions were within the deductible limits of section 404(a) because the anticipated contributions for *all* of the CBA plans to which petitioner contributed for their respective plan years did not exceed any maximum deduction limitation under section 404(a). But petitioner's *own* contributions, if the so-called grace period contributions are included, as petitioner insists they should be, substantially exceeded its anticipated contributions. In our Opinion we stated that since section 413(b)(7) requires that the computation of anticipated contributions be consistent with actual employer contributions, a taxpayer (petitioner included) may not arbitrarily expand its own deduction limitation for any taxable year by the simple expedient of deducting actual contributions that are inconsistent with its anticipated contributions. *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. at 14. If any one employer-contributor to a multiemployer plan could expand its deduction limitation by this method, all could do so, a result not intended by section 413(b)(7). Nowhere in any of its moving papers does petitioner attempt to address this point.

Petitioner cites *Airborne Freight Corp. v. United States*, 76 AFTR 2d 95-7497, 96-1 USTC par. 50,004 (W.D. Wash. 1995), as being the only other decision to consider the

issue herein. *Airborne Freight Corp.*, however, is factually distinguishable from the instant case. Our Opinion took into account testimony by the plan administrator that she customarily determined the minimum funding standards on an annual basis with reference to hours worked by covered employees before the year closed. This testimony was probative that the payments in question, insofar as they were based on wages earned after the year's end, were not treated in the same manner that the CBA plans would treat a payment actually received on the last day of the taxable year. See *Lucky Stores, Inc., & Subs. v. Commissioner*, 107 T.C. at 13-15; cf. Rev. Rul. 76-28, 1976-1 C.B. 106. The order granting plaintiff's motion for summary judgment in *Airborne Freight Corp.*, on the other hand, made no mention of whether testimony to a similar effect was received in that case.

Furthermore, the District Court in *Airborne Freight Corp.* did not directly address the question of the deduction limitations of section 404(a), but instead relied almost entirely upon section 404(a)(6) and Rev. Rul. 76-28 in holding for the taxpayer. However, referring also to section 413(b)(7), the District Court rejected the IRS argument, as phrased by the court, "that by taking more of a deduction for the 1989 tax year than had been anticipated, AFC interfered with other employers' ability to estimate the plan-wide deductible limit". *Airborne Freight Corp. v. United States*, 76 AFTR 2d 95-7497, at 95-7499, 96-1 USTC par. 50,004, at 83,015 (W.D. Wash. 1995). The court went on to reason that because the taxpayer was late in filing its 1989 tax return, it could not have interfered with other employers' ability to calculate and claim their

deductions. As indicated by our Opinion and the discussion above, we respectfully disagree with the District Court's analysis in that respect.

A final word. We emphasize that what petitioner seeks to obtain by its one-time bunching of 19 or 20 months of contributions in a single year is a permanent tax deferral. This concept is explicitly spelled out in an attachment to the Declaration of Richard E. V. Harris, in the following words: "Thus, assuming a [taxpayer] double extends its Federal income tax return, it may be possible to realize a one-time tax savings [sic] to the extent of the tax benefit on nine months of contributions to the plan". (Obviously, the bunching technique could not be applied in any subsequent year because to do so would require double counting of a bunched contributions.) For the reasons already articulated, we do not believe the limitation of section 413(b)(7) permits the accelerated deduction of the "[eight or] nine months of contributions" sought by petitioner in this case.

For the above reasons,

An Order will be issued denying petitioner's Motion and the Judicial Notice Motions.

APPENDIX D

UNITED STATES TAX COURT
Washington, D.C. 20217

LUCKY STORES, INC., AND SUBSIDIARIES,	)	
Petitioner,	)	
v.	)	Docket No. 4446-93
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent.	)	

ORDER

Pursuant to the determination of the Court as set forth in its Opinion filed February 10, 1997, it is

ORDERED that petitioner's Motion For Reconsideration and Motion Requesting The Court To Take Judicial Notice, filed October 3, 1996, respectively, and petitioner's Second Motion Requesting The Court To Take Judicial Notice, filed December 12, 1996, are denied.

(Signed) ARTHUR L. NIMS, III
Arthur L. Nims, III
Judge

Dated: Washington, D.C.
February 10, 1997

APPENDIX E

Airborne Freight Corporation, Plaintiff v. United States of America, Defendant.

No. C95-301R

United States District Court for the Western District of Washington

November 6, 1995, Dated
November 7, 1995, Filed, Entered

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT

ROTHSTEIN, District Judge: THIS MATTER comes before the court on cross-motions for summary judgment by plaintiff Airborne Freight Corporation and defendant United States of America.[1] Having reviewed the motions together with all documents filed in support and in opposition and being fully advised, the court finds and rules as follows:

I. FACTUAL BACKGROUND

This case involves the issue of whether plaintiff Airborne Freight Corporation ("AFC") can claim certain deductions pursuant to the Internal Revenue Code for contributions made to several multi-employer defined benefits pension plans. As an employer subject to various collective bargaining agreements, AFC contributes to the

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[1] Defendant's motions for leave to file overlength response and reply briefs are GRANTED.

plans on a monthly basis at a set rate for specific units of work performed by union employees.

For the tax years ending December 31, 1989 and December 31, 1990, AFC obtained extensions of the time to file its tax returns until September 15, 1990 and September 15, 1991, respectively. On its 1989 return, AFC claims deductions for all contributions made to the multi-employer plans during the 1989 calendar year and during the $8^1/_2$ month period from the end of calendar year 1989 until the extended due date for the 1989 return. On its 1990 return, AFC claimed deductions for all contributions made to the plans from September 16, 1990 through September 15, 1991. The periods between the end of the calendar year and the extended date of filing of the tax returns will hereafter be referred to as the grace periods.

The Internal Revenue Service ("IRS") disallowed all deductions claimed by AFC on these two tax returns for multi-employer plan contributions, which were paid during the grace periods after the end of the calendar years for which the returns were filed. AFC filed this lawsuit on the grounds that it is entitled to receive a refund of the amount paid to the IRS as a result of the disallowance of the deductions claimed for those contributions made during the grace periods. There is no dispute about the material facts, and both AFC and the IRS have filed cross-motions for summary judgment.

II. LEGAL ARGUMENT

A. IRC § 404 and IRS Revenue Ruling 76-28

The deduction of employer contributions to pension plans is governed by § 404 of the Internal Revenue Code ("IRC"). Section 404(a)(6) provides that contributions made to a qualified plan after the close of the employer's tax year, but prior to the extended due date for filing the employer's tax return for that year, are deemed made on the last day of the preceding tax year and are accordingly deductible under § 404(a)(1) if they are made on account of the preceding taxable year.

No regulations interpreting § 404(a)(6) have been issued. However, the IRS has issued Revenue Ruling 76-28, which includes some guidelines for applying § 404(a)(6). That ruling states that employer payments made to a qualified plan after the end of the tax year will be considered to have been made "on account of" the preceding taxable year within the meaning of § 404(a)(6) if (1) the plan treats the payment as it would treat a payment actually received on the last day of the preceding taxable year; and (2) the employer designates the payment in writing to the plan as made on account of the preceding taxable year, or deducts the payment on its tax return on or before the due date of that return, including extensions.

There is no dispute that AFC has met the second requirement. The question is whether the first requirement has been satisfied. Given the nature of multi-employer defined benefits plans and the way in which they operate, the court concludes that it has. The plan treated the contributions which AFC made during the

grace periods just as it treated contributions made before the end of the taxable year. That is, the plan deposited the contributions in one single pooled fund. Neither the amount of the contributions nor the timing, *i.e.*, whether they were made before the end of the tax year or during the succeeding grace period, affected the actual benefits payable to employees.[2]

Thus, the court finds that AFC's actions in claiming deductions for the contributions made during the grace periods are consistent with the language and requirements of § 404(a)(6) as well as satisfying the IRS's own guidelines for applying § 404(a)(6) set forth in Rev. Rul. 76-28.

B. Other IRC Provisions

In order to refute AFC's argument, the IRS invokes several other IRC provisions including § 446, which requires a taxpayer to obtain the IRS Commissioner's

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[2] In the same vein, the IRS contends that the pension contributions paid in 1990 were not "on account of" the 1989 tax year as required by § 404(a)(6) because the amount of those contributions was calculated based on employee hours worked in 1990, not in 1989. While this is true, the court again notes that there is no connection between the amount of the contributions and the level of benefits paid or to whom they are paid. Thus, the actual date on which the contributions were made and the employee hours on which they were calculated does not affect the plan's payment of benefits. Rev. Rul. 76-28 allows the taxpayer to treat contributions to its pension plan during the grace period as having been made "on account of" the preceding tax year if the taxpayer meets the requirements of that ruling. The court has already found that AFC did so.

approval when changing its method of accounting. The IRS argues that AFC's decision to claim payments made in 1990 as deductions for the tax year ending December 31, 1989 was a change in accounting method for which AFC had to get prior permission from the IRS Commissioner under § 446(e).

The court rejects this argument. AFC's decision to claim certain deductions on its 1989 rather than its 1990 tax return does not constitute a change in accounting methods because it does not affect the computation of the deduction amount or the limit on the deduction. Instead, AFC's decision was purely one of timing as allowed by Congress under § 404(a)(6).

The IRS also cites to IRC § 446(b), which gives the Commissioner discretion to require the taxpayer to use a different accounting method if the Commissioner concludes that the taxpayer's method does not clearly reflect income. As stated above, the court does not believe that an accounting method is involved in this case. Moreover, Congress specifically provided in § 404(a)(6) that a taxpayer is authorized to claim deductions in the manner outlined by the statute.

The IRS's final argument is predicated on the fact that there is a plan-wide deductible limit under IRC § 413(b)(7). In other words, all of the deductions taken by all of the employers contributing to one multi-employer plan cannot exceed a plan-wide limit. This limit is calculated by determining the anticipated contributions for the plan year from all contributing employers. The IRS argues that by taking more of a deduction for the 1989 tax year than had been anticipated, AFC interfered with

other employers' ability to estimate the plan-wide deductible limit.

This argument has no merit. The IRS concedes that AFC claimed the disputed deductions only after having calculated the plan-wide deductible for the 1989 tax year and having ascertained that it would not be exceeded. Because AFC's ability to claim additional deductions was predicated on the fact that it filed its 1989 tax return well after the end of the tax year, it could not have interfered with other employers' ability to calculate and claim their deductions unless they also obtained extensions on the time for filing their tax returns. It seems only fair to require that those employers who choose to file their tax returns later must accept the risk of possible limitations on their ability to claim deductions.

III. CONCLUSION

AFC'S motion for summary judgment is GRANTED; the IRS's cross-motion for summary judgment is DENIED.

APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUCKY STORES, INC. AND SUBSIDIARIES, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	)	CA No. 97-70810 Tax Ct. No. 4446-93 ORDER

[Filed Nov. 12, 1998]

BEFORE: CANBY and REINHARDT, Circuit Judges, and RESTANI,[1] Judge, United States Court of International Trade

The appellant's motion to defer action on the petition for rehearing with suggestion for rehearing en banc is DENIED.

The panel, as constituted above, has unanimously voted to deny the petition for rehearing. Judge Reinhardt voted to reject the suggestion for rehearing en banc, and Judge Canby and Judge Restani have so recommended.

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[1] The Honorable Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation.

The suggestion for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX G

THE UNITED STATES CONSTITUTION

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX H

26 U.S.C. § 404(a)(6) (1986)

SEC. 404. DEDUCTION FOR CONTRIBUTIONS OF AN EMPLOYER TO AN EMPLOYEES' TRUST OR ANNUITY PLAN AND COMPENSATION UNDER A DEFERRED-PAYMENT PLAN.

(a) GENERAL RULE. – If contributions are paid by an employer to or under a stock bonus, pension, profit-sharing, or annuity plan, or if compensation is paid or accrued on account of any employee under a plan deferring the receipt of such compensation, such contributions or compensation shall not be deductible under this chapter; but if they would otherwise be deductible, they shall be deductible under this section, subject, however, to the following limitations as to the amounts deductible in any year:

* * *

(6) TIME WHEN CONTRIBUTIONS DEEMED MADE. – For purposes of paragraphs (1), (2), and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

APPENDIX I

26 U.S.C. § 7805 (1986)

SEC. 7805 RULES AND REGULATIONS

(a) AUTHORIZATION. – Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.

(b) RETROACTIVITY OF REGULATIONS OR RULINGS. – The Secretary may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect.

(c) PREPARATION AND DISTRIBUTION OF REGULATIONS, FORMS, STAMPS, AND OTHER MATTERS. – The Secretary shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue.

(d) MANNER OF MAKING ELECTIONS PRESCRIBED BY SECRETARY. – Except to the extent otherwise provided by this title, any election under this title shall be made at such time and in such manner as the Secretary shall by regulations or forms prescribe.

APPENDIX J

STATEMENT OF PROCEDURAL RULES

* * *

Subpart F – Rules, Regulations, and Forms (26 C.F.R., Part 601)

* * *

§ 601.601. Rules & Regulations. –

* * *

(d) *Publication of rules and regulations* – (1) *General.* All internal revenue regulations and Treasury decisions are published in the FEDERAL REGISTER and in the Code of Federal Regulations. See Paragraph (a) of § 601.702. The Treasury decisions are also published in the weekly Internal Revenue Bulletin and the semi-annual Cumulative Bulletin. The Internal Revenue Bulletin is the authoritative instrument of the Commissioner for the announcement of official rulings, decisions, opinions, and procedures, and for the publication of Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items pertaining to internal revenue matters. It is the policy of the Internal Revenue Service to publish in the Bulletin all substantive and procedural rulings of importance or general interest, the publication of which is considered necessary to promote a uniform application of the laws administered by the Service. Procedures set forth in Revenue Procedures published in the Bulletin which are of general applicability and which have continuing force and effect are incorporated as amendments to the Statement of procedural Rules. It is also the policy to publish in the Bulletin all rulings which

revoke, modify, amend, or affect any published ruling. Rules relating solely to matters of internal practices and procedures are not published; however, statements of internal practices and procedures affecting rights or duties of taxpayers, or industry regulation, which appear in internal management documents, are published in the Bulletin. No unpublished ruling or decision will be relied on, used, or cited by any officer or employee of the Internal Revenue Service as a precedent in the disposition of other cases.

(2) *Objectives and standards for publication of Revenue Rulings and Revenue Procedures in the Internal Revenue Bulletin.* – (i)(*a*) A "Revenue Ruling" is an official interpretation by the Service that has been published in the Internal Revenue Bulletin. Revenue Rulings are issued only by the National Office and are published for the information and guidance of taxpayers, Internal Revenue Service officials, and others concerned.

(*b*) A "Revenue Procedure" is a statement of procedure that affects the rights or duties of taxpayers or other members of the public under the Code and related statutes or information that, although not necessarily affecting the rights and duties of the public, should be a matter of public knowledge.

(ii)(*a*) The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for the publication of official rulings and procedures of the Internal Revenue Service, including all rulings and statements of procedure which supersede, revoke, modify, amend, or affect any previously published ruling or procedure. The Service also announces in the Bulletin the

Commissioner's acquiescences and non-acquiescences in decisions of the United States Tax Court (other than decisions in memorandum opinions), and publishes Treasury decisions, Executive orders, tax conventions, legislation, court decisions, and other items considered to be of general interest. The Assistant Commissioner (Technical) administers the Bulletin program.

(*b*) The Bulletin is published weekly. In order to provide a permanent reference source, the contents of the Bulletin are consolidated semiannually into an indexed Cumulative Bulletin. The Bulletin Index-Digest System provides a research and reference guide to matters appearing in the Cumulative Bulletins. These materials are sold by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

(iii) The purpose of publishing revenue rulings and revenue procedures in the Internal Revenue Bulletin is to promote correct and uniform application of the tax laws by Internal Revenue Service employees and to assist taxpayers in attaining maximum voluntary compliance by informing Service personnel and the public of National Office interpretations of the internal revenue laws, related statutes, treaties, regulations, and statements of Service procedures affecting the rights and duties of taxpayers. Therefore, issues and answers involving substantive tax law under the jurisdiction of the Internal Revenue Service will be published in the Internal Revenue Bulletin, except those involving:

(*a*) Issues answered by statute, treaty, or regulations;

(*b*) Issues answered by rulings, opinions, or court decisions previously published in the Bulletin;

(*c*) Issues that are of insufficient importance or interest to warrant publication;

(*d*) Determinations of fact rather than interpretations of law;

(*e*) Informers and informers' rewards; or

(*f*) Disclosure of secret formulas, processes, business practices, and similar information.

Procedures affecting taxpayers' rights or duties that relate to matters under the jurisdiction of the Service will be published in the Bulletin.

(iv) [Reserved].

(v)(*a*) Rulings and other communications involving substantive tax law published in the Bulletin are published in the form of Revenue Rulings. The conclusions expressed in Revenue Rulings will be directly responsive to and limited in scope by the pivotal facts stated in the revenue ruling. Revenue Rulings arise from various sources including rulings to taxpayers, technical advice to district offices, studies undertaken by the Office of the Assistant Commissioner (Technical), court decisions, suggestions from tax practitioner groups, publications, etc.

(*b*) It will be the practice of the Service to publish as much of the ruling or communication as is necessary for an understanding of the position stated. However, in order to prevent unwarranted invasions of personal privacy and to comply with statutory provisions, such as 18 U.S.C. 1905 and 26 U.S.C. 7213, dealing with disclosure of

information obtained from members of the public, identifying details, including the names and addresses of persons involved, and information of a confidential nature are deleted from the ruling.

(*c*) Revenue Rulings, other than those relating to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, apply retroactively unless the Revenue Ruling includes a specific statement indicating, under the authority of section 7805(b) of the Internal Revenue Code of 1954, the extent to which it is to be applied without retroactive effect. Where Revenue Rulings revoke or modify rulings previously published in the Bulletin the authority of section7805(b) of the code ordinarily is invoked to provide that the new rulings will not be applied retroactively to the extent that the new rulings have adverse tax consequences to taxpayers. Section 7805(b) of the Code provides that the Secretary of the Treasury or his delegate may prescribe the extent to which any ruling is to be applied without retroactive effect. The exercise of this authority requires an affirmative action. For the effect of Revenue Rulings on determination letters and opinion letters issued with respect to the qualification of pension, annuity, profit-sharing, stock bonus, and bond purchase plans, see paragraph (o) of § 601.201.

(*d*) Revenue Rulings published in the Bulletin do not have the force and effect of Treasury Department Regulations (including Treasury decisions), but are published to provide precedents to be used in the disposition of other cases, and may be cited and relied upon for that purpose. No unpublished ruling or decision will be relied

on, used, or cited, by an officer or employee of the Service as a precedent in the disposition of other cases.

(*e*) Taxpayers generally may rely upon Revenue Rulings published in the Bulletin in determining the tax treatment of their own transactions and need not request specific rulings applying the principles of a published Revenue Ruling to the facts of their particular cases. However, since each Revenue Ruling represents the conclusion of the Service as to the application of the law to the entire state of facts involved, taxpayers, Service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. They should consider the effect of subsequent legislation, regulations, court decisions, and revenue rulings.

(*f*) Comments and suggestions from taxpayers or taxpayer groups on Revenue Rulings being prepared for publication in the Bulletin may be solicited, if justified by special circumstances. Conferences on Revenue Rulings being prepared for publication will not be granted except where the Service determines that such action is justified by special circumstances.

(vi) Statements of procedures which affect the rights or duties of taxpayers or other members of the public under the Code and related statutes will be published in the Bulletin in the form of Revenue Procedures. Revenue Procedures usually reflect the contents of internal management documents, but, where appropriate, they are also published to announce practices and procedures for guidance of the public. It is Service practice to publish

as much of the internal management document or communication as is necessary for an understanding of the procedure. Revenue Procedures may also be based on internal management documents which should be a matter of public knowledge even though not necessarily affecting the rights or duties of the public. When publication of the substance of a Revenue Procedure in the Federal Register is required pursuant to 5 U.S.C. 552, it will usually be accomplished by an amendment of the Statement of Procedural Rules (26 CFR Part 601).

(vii)(*a*) The Assistant Commissioner (Technical) is responsible for administering the system for the publication of Revenue Rulings and Revenue Procedures in the Bulletin, including the standards for style and format.

(*b*) In accordance with the standards set forth in subdivision (iv) of this subparagraph, each Assistant Commissioner is responsible for the preparation and appropriate referral for publication of Revenue Rulings reflecting interpretations of substantive tax law made by his office and communicated in writing to taxpayers or field offices. In this connection, the Chief Counsel is responsible for the referral to the appropriate Assistant Commissioner, for consideration for publication as Revenue Rulings, of interpretations of substantive tax law made by his Office.

(*c*) In accordance with the standards set forth in subdivision (iv) of this subparagraph, each Assistant Commissioner and the Chief counsel is responsible for determining whether procedures established by any

office under his jurisdiction should be published as Revenue Procedures and for the initiation, content, and appropriate referral for publication of such Revenue Procedures.

* * *

APPENDIX K

Rev. Rul. 76-28[1]

This Revenue Ruling provides rules with respect to the application of section 404(a)(6) of the Code, as amended by the Employee Retirement Income Security Act of 1974 ("ERISA") (Pub. Law No. 93-406, 88 Stat. 829), 1974-3 C.B. 148, in those areas where the Service has determined that guidelines are necessary pending the issuance of regulations.

Section 404(a)(6) of the Code, as amended by ERISA, provides that for purposes of paragraphs (1), (2), and (3) of section 404(a), a taxpayer shall be deemed to have made payment of a contribution to a qualified retirement plan on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the income tax return for such taxable year (including extensions thereof).

Section 404(a)(6), as amended by ERISA, is applicable to contributions on account of taxable years of the employer which end with or within plan years which: (a) in the case of a plan which was not in existence on January 1, 1974, begin after September 2, 1974; (b) in the case of a plan which was in existence on January 1, 1974, and with respect to which the elections prescribed by sections 1017(d) and 1017(i) of ERISA have not been made, begin after December 31, 1975; (c) in the case of a

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[1] Also released as TIR-1431, dated Jan. 5, 1976.

plan with respect to which the election provided in section 1017(d) of ERISA (see § 11.410(a)-2(d) of the Temporary Income Tax Regulations under the Employee Retirement Income Security Act of 1974) has been made, are subject to such election, or are subsequent thereto; or (d) in the case of a plan with respect to which the election provided in section 1017(i) of ERISA (as amended by section 402 of the Tax Reduction Act of 1975) [Pub. L. 94-12, 1975-1 C.B. 545] has been made, are subject to such election, or are subsequent thereto.

Whether a taxpayer is on the cash or accrual method of accounting, and whether or not the conditions for accrual otherwise generally required of accrual basis taxpayers have been met, a payment made after the close of an employer's taxable year to which amended section 404(a)(6) applies shall be considered to be on account of the preceding taxable year if (a) the payment is treated by the plan in the same manner that the plan would treat a payment actually received on the last day of such preceding taxable year of the employer, and (b) either of the following conditions is satisfied.

(1) The employer designates the payment in writing to the plan administrator or trustee as a payment on account of the employer's preceding taxable year, or

(2) The employer claims such payment as a deduction on his tax return for such preceding taxable year (or, in the case of a contribution by a partnership on behalf of a partner, the contribution is shown on schedule K of the partnership tax return for such year).

For purposes of the above requirements, the following rules shall apply.

First, a payment may be designated as a payment on account of the preceding taxable year in the manner provided above at any time on or before the due date of the employer's tax return for such year (including extensions thereof).

Second, employers whose tax returns are due (including extensions thereof) on or before March 31, 1976, may, at any time on or before September 30, 1976, either designate such payment in the manner provided above or file an amended return claiming such payment in the manner provided above.

Third, once a payment has been designated or claimed on a return in the manner provided above as being on account of a preceding taxable year, the choice made shall be irrevocable and an employer may not retract or change such designation or claim.

The rules contained in this Revenue Ruling do not change the requirement that a plan must be in existence as of the last day of the employer's taxable year with respect to which a contribution is made. Furthermore, the rules contained in this Revenue Ruling implement the amendment made to section 404(a)(6) of the Code by ERISA, and, therefore, are inapplicable to taxable years of an employer not affected by that amendment.

APPENDIX L

ORRICK, HERRINGTON
& SUTCLIFFE LLP

October 7, 1996

Direct Dial
(415) 773-5949

VIA FACSIMILE (503) 326-5452 AND MAIL
Alan Summers, Esq.
Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

By now you may have received and read our Motion for Reconsideration and accompanying documents. Please do not hesitate to call me should you have questions.

In the interim, to expedite matters, it would be much appreciated if you would confirm that the documents attached to the Request for Judicial Notice are true and accurate. As to most, if nearly all, that should be an easy matter. If you want to discuss specific documents, please call at your early convenience.

Very truly yours,

/s/ Paul
Paul J. Sax

cc: Kevin G. Croke, Esq.
Elizabeth L. Groenewegen, Esq.

Office of the Chief Counsel
Internal Revenue Service
Pacific Northwest District
Portland Office
222 S.W. Columbia Suite 450
Portland, Oregon 97201

October 11, 1996

Paul J. Sax, Esq.
Orrick, Herrington & Sutcliffe LLP
400 Sansome Street
San Francisco, Ca 94111-3143

Re: Lucky Stores, Inc. and Subsidiaries v. Commissioner
Docket No. 4446-93

Dear Mr. Sax,

I have discussed with the other members of respondent's trial team the request, made in your letter of October 7, that we confirm the truth and accuracy of the documents attached to petitioners' request for Judicial Notice. At this time, we think it premature to respond to your request. Should the Court grant petitioner's Motion for Reconsideration, we will be guided by the Court's accompanying order as to any further action that needs to be taken.

If you wish to discuss this matter further, we will be happy to do so.

Sincerely yours,

/s/ Alan Summers
Alan Summers
Special Trial Attorney

cc: Kevin Croke, Esq. (Via E-mail)
Elizabeth Groenwegen,[sic] Esq. (via E-mail)

ORRICK, HERRINGTON
& SUTCLIFFE LLP

October 18, 1996

Direct Dial
(415) 773-5949

VIA FACSIMILE (503) 326-5452 AND MAIL
Alan Summers, Esq.
Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

Thank you for your letter of October 11. The Court's order of October 10 should have reached you by now, confirming that the Court is considering both of our motions, for reconsideration and for judicial notice. Accordingly, we still need you to confirm expressly that the exhibits attached to the Harris Declaration are true and accurate copies, as requested in my letter of October 7.

Again, our request is not simply in connection with the motion for reconsideration, but also applies to the independent request that the court take judicial notice.

I know of no conceivable issue, but if you do have a question please let me know promptly so that we can address it.

Very truly yours,

/s/ Paul J. Sax
Paul J. Sax

cc: Kevin Croke, Esq.
Elizabeth Groenewegen, Esq.

ORRICK, HERRINGTON
& SUTCLIFFE LLP

October 23, 1996

Direct Dial
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VIA FACSIMILE (503) 326-5452 AND MAIL

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Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

Now that you have had time to reflect upon the matters set out in our Motion for Reconsideration, we urge you (and Jim Holland) to take a fresh look at the pension plan issue and formally reconsider the Service's position.

Very truly yours,

/s/ Paul
Paul J. Sax

cc: Kevin Croke, Esq. (by mail)
Elizabeth Groenewegen, Esq. (by mail)

ORRICK, HERRINGTON
& SUTCLIFFE LLP

October 24, 1996

Direct Dial
(415) 773-5949

VIA FACSIMILE (503) 326-5452 AND MAIL
Alan Summers, Esq.
Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

By now you must have confirmed that both TAM 8210014 and TAM 8303002 did indeed involve multi-employer defined benefit plans, some of the very plans involved in this case.

Please notify the Tax Court *now* that you have confirmed these facts to be true. Separate and apart from your right to file objections in December, we submit that you have an independent duty to notify the Court. You should want to correct the erroneous impression created by your reply brief.

I have taken the liberty of enclosing a copy of the Service's Mission Statement and Statement of Principles of Internal Revenue Tax Administration. IRB 1996-42,2. They too speak to the need to fully and fairly inform the Court.

I earnestly hope that you will delay no longer in notifying the Court, in order to expedite a fair and appropriate resolution of this matter.

Very truly yours,

/s/ Paul
Paul J. Sax

cc: Kevin Croke, Esq. (by mail)
Elizabeth Groenewegen, Esq. (by mail)

Mission of the Service

The purpose of the Internal Revenue Service is to collect the proper amount of tax revenue at the least cost; serve the public by continually improving the quality of our products and services; and perform in a manner warranting the highest degree of public confidence in our integrity, efficiency and fairness.

Statement of Principles of Internal Revenue Tax Administration

The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress.

With this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by

Congress; to determine the reasonable meaning of various code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view.

At the heart of administration is interpretation of the Code. It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he or she is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the true meaning of the statute.

The Service also has the responsibility of applying and administering the law in a reasonable, practical manner. Issues should only be raised by examining officers when they have merit, never arbitrarily or for trading purposes. At the same time, the examining officer should never hesitate to raise a meritorious issue. It is also important that care be exercised not to raise an issue or to ask a court to adopt a position inconsistent with an established service position.

Administration should be both reasonable and vigorous. It should be conducted with as little delay as possible and with great courtesy and considerateness. It should never try to overreach, and should be reasonable within the bounds of law and sound administration. It should, however, be vigorous in requiring compliance with law and it should be relentless in its attack on unreal tax devices and fraud.

ORRICK, HERRINGTON
& SUTCLIFFE LLP

November 14, 1996

Direct Dial
(415) 773-5949

VIA FACSIMILE (503) 326-5452 AND MAIL
Alan Summers, Esq.
Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

Following up on my letters of October 7, October 18, October 23 and October 24, we hope that you and the Service have been seriously reconsidering your position.

Whatever the status of your reconsideration, you are again urged to inform the court promptly that both TAM 8210014 and TAM 8303002 not only did involve multi-employer defined benefit plans but also involved some of the very same defined benefit plans at issue in *Lucky* (*i.e.*, the Central States and the Western Conference plans). You have an independent duty to correct the record promptly on these points.

By now you should have confirmed or reconfirmed that TAM 8714008, which was cited in our Motion for Reconsideration (at ¶ 16) and in our separate Request For Judicial Notice (at ¶ 40), also involved one of the very

same multiemployer defined benefit plans (*i.e.*, the Central States plan). Paragraph 40 of our Request merely quoted from the published TAM:

> "[E]mployer makes monthly contributions to the . . . (Fund) on behalf of its covered employees."

However, as you presumably know by now, the Request For Technical Advise Concerning Deductions For Contributions To Union Pension Plan clearly stated that the taxpayer (Copps) was in the "business of wholesale and retail grocery distribution" and was "obligated to make contributions on behalf of all covered employees to the Central States Southeast and Southwest Areas Pension Fund (Central States)." [Taxpayer Statement of Facts, 1st ¶].

You might note that this particular TAM proceeding was pending when Lucky filed its tax return, and that the TAM was issued shortly after Lucky filed its tax return. Moreover, the technical advice request expressly noted the taxpayer's reliance on, *inter alia*, Revenue Ruling 76-28 and TAM 8210014, two of the authorities relied upon by Lucky. Without any question, the Services' National Office issued formal TAMs on the Lucky pension plan issue both before and after Lucky filed its return.

Whatever you may have thought or known before, there now can be no remaining doubt. The Court was neither fully nor fairly informed by the Service, and both you and the Service have separate and independent obligations to notify the Court promptly. In addition, your

position in the case contradicts the Service's own Statement of Principles, which expressly states:

> "The Service also has the responsibility of applying and administering the law in a reasonable, practical manner. Issues should only be raised by examining officers when they have merit. . . . It is important that **care be exercised not** to raise an issue or **to ask a court to adopt a position inconsistent with an established Service position.**

With formal TAMs issued by the Service's National office for contributions to the *very same* multiemployer defined benefit plans, and with such formal TAMs issued both *before* and *after* Lucky filed its tax return, any of several principles require you to inform the Court now without further delay – even if you have not already been expressly directed to do so.

Very truly yours,

/s/ Paul
Paul J. Sax

cc: Kevin Croke, Esq. (by mail)
Elizabeth Groenewegen, Esq. (by mail)

Office of the Chief Counsel
Internal Revenue Service
Pacific Northwest District
Portland Office
222 S.W. Columbia Suite 450
Portland, Oregon 97201
(503) 326-3185
Fax (503) 326-5452

November 22, 1996

Paul J. Sax, Esq.
Orrick, Herrington & Sutcliffe LLP
400 Sansome Street
San Francisco, Ca. 94111-5759

In Re: Lucky Stores, et al, Docket No. 4446-93

Dear Mr. Sax:

I have considered and discussed with my colleagues your request contained in your letters of October 23 and 24, 1996 that we immediately notify the Court about certain matters.

We have decided against making an interim response. We will endeavor to address all of your concerns in our written response that is due to be filed with the Court on or before December 9, 1996.

Very truly yours,

/s/ Alan Summers
Alan Summers

cc: VIA e-mail
Elizabeth Groenwegen,[sic] Esq.
Kevin Croke, Esq.
Robert E. Casey, Esq.

ORRICK, HERRINGTON
& SUTCLIFFE LLP

December 5, 1996

Direct Dial
(415) 773-5949

VIA FACSIMILE (503) 326-5452 AND MAIL
Alan Summers, Esq.
Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

Thank you for your November 22 letter in which you reserved response to our concerns until your formal, written response due December 9.

Nevertheless, nearly two months have elapsed since we separately asked you to confirm that the attachments to the initial Harris Declaration are true and accurate copies. By now you must have confirmed that they are true and accurate copies. Could you please confirm this basic point now? A handwritten notation confirming this fact faxed back to me on a copy of this letter will suffice.

Very truly yours,

/s/ Paul
Paul J. Sax

cc: Kevin G. Croke, Esq.
Elizabeth L. Groenewegen, Esq.

ORRICK, HERRINGTON
& SUTCLIFFE LLP

December 18, 1996

Direct Dial
(415) 773-5949

VIA FACSIMILE (503) 326-5452 AND MAIL
Alan Summers, Esq.
Special Trial Counsel
Internal Revenue Service
222 S.W. Columbia
450 KOIN Center
Portland, OR 97201

Lucky Stores, Inc., and Subsidiaries
v. Commissioner
Docket No. 4446-93

Dear Alan:

I noted with interest a comment in your recent memorandum to the Court acknowledging that we had asked the government to reconsider its position, and that you were not responding to that request because the record in the case is closed.

Let there be no mistake, we are urging the government to reconsider its position on the throwback deduction issue, not just its position in this case. As a matter of sound tax policy, the government ought to reconsider wholly without regard to the record in Lucky Stores, Inc.

Very truly yours,

/s/ Paul
Paul J. Sax

cc: Kevin G. Croke, Esq.
Elizabeth L. Groenewegen, Esq.

APPENDIX M

U.S. Department of Justice

Tax Division

PLEASE REPLY TO: P.O. Box 502
Wshington, D.C. 20044

[SEAL]
Tel. No. (202) 514-3361
Fax No. (202) 514-8456

SParks
5-82-9057
CMN 9569087

September 15, 1997

FACSIMILE
Richard E.V. Harris, Esquire
Orrick, Herrington & Sutcliffe, LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-2143

Re: Airborne Freight Corp. v. United States (9th Cir. No. 97-35129)

Dear Mr. Harris:

This responds to the voicemail message you left for me on September 11, 1997, concerning whether the Government disputes the facts asserted in the request for judicial notice filed by you on behalf of the California Chamber of Commerce, et al., as amicus, and whether we will withdraw our opposition to that request. As we explained in our opposition to that request, Section 6103 of the Internal Revenue Code (26 U.S.C.) prohibits us or the IRS from disclosing tax return information, and,

hence, we can not confirm or deny facts asserted by you that concern the federal income tax liabilities of taxpayers named in your request for judicial notice. In addition, for the reasons stated in our opposition to the request for judicial notice, we continue to believe that the facts alleged in your request for judicial notice are not of a type that are properly the subject of judicial notice. Accordingly, as we previously have informed you, we do not intend to withdraw our opposition to your request.

If you believe we have substantially misperceived the applicable law on either of these matters, and would like to provide us with additional authorities that support your position, please feel free to do so. Any submission made will be duly considered.

Finally, my recollection is that we discussed the above matters approximately 12 weeks ago, and that, after consulting with appropriate persons in this office, I informed you that we would not withdraw our opposition to your request. In order to avoid any further miscommunications concerning these matters, I would suggest that you put any further requests of this office concerning such matters in writing. We will, in turn, respond in writing.

Sincerely yours,

/s/ Steven W. Parks
STEVEN W. PARKS
Attorney
Appellate Section

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 15, 1997

Direct Dial
(415) 773-5787

VIA FACSIMILE AND U.S. MAIL

Steven W. Parks, Esq.
Appellate Section
Department of Justice, Tax Division
P.O. Box 502
Washington, D.C. 20044

Re: Airborne Freight Corp. v. United States
(Ninth Circuit Docket No. 97-35129)

Dear Mr. Parks:

This letter follows up my voicemail message of September 11.

I have not heard back from you since our telephone conversations on Friday, June 20. Twelve weeks have elapsed, and I am still waiting for your response.

On Friday, June 20, 1997, I expressly asked you to withdraw the objections to the request for judicial notice of the *amici curiae*. In your return call that same day, you declined to do so then but did indicate that you would reconsider the request upon your return from vacation. In the meantime, I was not to delay in filing my written response to your objections. I filed the response to your objections on June 26, and you were served with a copy prior to my filing it with the 9th Circuit. By now you should have read and considered my response and considered my questions and requests.

During our June 20 conversations, I asked you which factual statements *if any,* in our statement of facts were statements that you believed were not true. You did not identify any statement.

I also asked you which factual statements, *if any,* in the statement of facts were items about which you had any real doubt or question. You did not identify any statement.

I urged you then to reread the statement of facts in the amicus brief. (For your convenience an additional copy is attached hereto.)

As I said during our telephone conferences, I certainly believe the statement of facts to be true. I also said that you *must know* that each statement was true, which (as I recall) you did not actually deny. When you would not identify your contact at the IRS or any person at the IRS with whom you had checked, and when you would not even confirm that you had actually checked with anyone at the IRS, I suggested that you now check with someone. I even suggested that you specifically contact Jim Holland who, I believe, should be familiar with the area.

Whatever your state of knowledge might have been at the time you filed the objections, you certainly *must now know* – or certainly *should now know* – that each of the statements of fact is true.

Whatever you might have assumed – or might have thought – or might have been told by someone in the IRS, you certainly *should now know* that each of the judicially noticeable points is accurate.

There is no reason for your continued delay in withdrawing the objections.

Are you now prepared to withdraw the objections to the request for judicial notice?

Are you now prepared to inform the 9th Circuit that you concede the genuineness and accuracy of the documents attached to my declaration (or, at the minimum, do not contest the genuineness and accuracy of any of them)?

I respectfully suggest that, having filed the objections, you, your superiors, and the Tax Division of the Department of Justice, each has an affirmative obligation to withdraw the objections to the judicial notice points and to inform the court that the documents attached to my declaration are genuine.

If you have *any question* about any part of our request or any item attached to my declaration, please call me immediately to let me know your question.

Please confirm that you are promptly going to file a formal withdrawal of your objections.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

REH:bem
Enclosure

[p. 2] [Attachment]

* * *

III. STATEMENT OF FACTS[1]

(i) Congressional enactment of ERISA in 1974

In 1974 Congress enacted ERISA. P.L. No. 93-406. ERISA added Internal Revenue Code section 413(b)(7), which simplified the section 401(a) determinations for multiemployer pension plans by mandating determinations on a planwide basis. ERISA also added section 404(a)(6), which states.

> For purposes of paragraphs (1), (2) and (3), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof).

(ii) The IRS's issuance of Revenue Ruling 76-28

In May 1976, the Internal Revenue Service interpreted section 404(a)(6) in Revenue Ruling 76-28. ADM-

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[1] The Statement of Facts by *amici curiae* provides additional, material information not adequately covered by the parties. Although portions may already be in the formal record or otherwise readily available, substantial portions are not. For the Court's convenience, the primary references are collected in the accompanying volume entitled "Request for Judicial Notice" ("JN") and the exhibits thereto ("JNX") together with the Addendum to this Brief ("ADM"). These matters are suitable for judicial notice, which may be taken at this stage of the proceedings. *See* Fed. R. Evid., Rule 201(f). *Amici curiae* respectfully request that judicial notice be taken.

A. The ruling expressly addressed the "on account of" language in section 404(a). In 1979 the Internal Revenue Service [p. 3] issued rulings applying Revenue Ruling 76-28 to defined benefit plans (LTR 7945115, August 9, 1979) and to defined contribution plans (LTR 8010123, December 17, 1979). In February 1981, the Internal Revenue Service made changes to the Internal Revenue Manual, which reflected its interpretations of section 404(a)(6) and Revenue Ruling 76-28. ADM-F and G.

(iii) The IRS's application of section 404(a)(6) and Revenue Ruling 76-28 to multiemployer defined benefit pension plans

In 1982 the Internal Revenue Service National Office issued a Technical Advice Memorandum ("TAM") which applied Revenue Ruling 76-28 to an employer's contributions to three multiemployer defined benefit pension plans. The plans included the Central States Southeast and Southwest Area Pension Plan ("Central States") and the Western Conference of Teamsters Pension Trust ("Western Conference"), two of the same multiemployer defined benefit plans at issue in *Airborne*. JN 5 (¶ 8) & JNX 22-23. The taxpayer was a national transportation company. JNX 17. The deductions taken for one tax year (1977) included all monthly contributions made to the multiemployer plans during the period January 1, 1977 to September 15, 1978. ADM-B. The TAM applied Revenue Ruling 76-28 to these defined benefit plans.

[p. 4] The Service concluded in TAM 8210014 that the throwback contributions actually made to these defined benefit plans "during 1978, but prior to the date (with

extensions) the 1977 tax return had to be filed, may be considered to be *on account of* the 1977 tax year." ADM-B (italics supplied). The TAM addressed the Revenue Ruling 76-28 requirement that "the payment is treated by the plan in the same manner . . . [as] a payment actually received on the last day of such preceding taxable year," which it explained was no obstacle to the deduction because the plans were defined benefit plans; a contribution to a defined benefit plan "generally does not have any effect on the actual benefits payable to an employee" and "for the plans involved in this case, benefits were not affected by the treatment by the plan of contributions made after the close of the year." ADM-B.

Prior to the Internal Revenue Service's issuance of the 1982 TAM, the taxpayer expressly bought [sic] to its attention the content and nature of two 1979 rulings and the additions made in 1981 to the Internal Revenue Manual. *See* JNX 20 ("The National Office has made clear in a number of private ruling letters that, in the case of a defined benefit plan, the deduction will be allowed for contributions made after the last day of the preceding taxable year if [p. 5] claimed on the employer's tax return) & JNX 21 ("the Service's position now has been reflected in the February 13, 1981 revision to the [Internal Revenue Manual]").

In 1983 the Internal Revenue Service issued another Technical Advice Memorandum (TAM 8303002) that again applied Revenue Ruling 76-28 to multiemployer defined benefit pension plans. The taxpayer was another national transportation company. The major plan was the Central States Plan, one of the very same multiemployer defined benefit plans at issue in TAM 8210014 and here in

Airborne. JNX 39. Again, the taxpayer had claimed a deduction for contributions up to the filing of the return. An Internal Revenue Service staff memorandum presented the technical advice issue to be decided as:

> Can a taxpayer claim a deduction in the current year for payments made to a union negotiated pension plan paid and based on employee wages incurred and paid [in the] subsequent year up to the date of filing?

JNX 27. The subsequently issued TAM applied Revenue Ruling 76-28 to the multiemployer plan contributions and allowed the deduction of the throwback contributions to the Central States Plan:

> [p. 6] We have determined that the taxpayer's deduction for payments made to [the Central States plan] after the end of the taxpayer's accounting year but before the due date, including extensions, for filing its tax return for that year can include all plan contributions made during the period 1/1/77 through 9/15/78.

ADM-C. The Internal Revenue Service also concluded that "deductions claimed on the 1978 and 1979 returns using the same reasoning are also allowable." *Id.*

The Internal Revenue Service has been fully aware of the implications of its interpretation of section 404(a)(6) and the application of Revenue Ruling 76-28 to multiemployer defined benefit plans like the Central States Plan. Prior to issuing TAM 8303002 and approving the additional throwback deduction, the Internal Revenue Service National Office was expressly informed by its field staff that the practice "appears to be prevalent in the trucking industry." *E.g.*, JNX 38. The Service was also

alerted by its own staff that "the same treatment could apply to any industry that has a similar union plan." *Id.*

Prior to issuing TAM 8303002 the Internal Revenue Service received additional information from its staff with details regarding the section 404(a)(6) advice that was being given in the area nationally based on its Revenue Ruling 76-28. JNX 29-30. (quotations from "Trucking Industry Employer [p. 7] Contribution to Multi-Employer Qualified Plan After Close of Taxable Year" explaining a "one time tax savings to the extent of the tax benefit on nine months of contributions to [the Central States Plan]") The National Office was also informed of the discussions "at the National Accounting & Finance Council (NAFC) Taxation Committee meeting" in June 1978, "which was attended by numerous representatives from various trucking firms around the country." JNX 30.

In 1985 the Internal Revenue Service National Office issued a Technical Advice Memorandum (TAM 8543002) that applied Revenue Ruling 76-28 to another defined benefit plan. ADM-D. The taxpayer made contributions "each month." For the 1977 tax year, the taxpayer also deducted the throwback contributions. The TAM also addressed the deductibility of throwback contributions in 1977 and in subsequent years. The published TAM described in detail the taxpayer's year-by-year practice, including:

> Through 1976, the taxpayer deducted as a pension expense for each taxable year, only those amounts contributed during the calendar, taxable year. In 1977, the taxpayer deducted as a pension expense not only those amounts contributed to the plan during the taxable year

> 1977, but, in addition, those amounts contributed monthly from January 1978 through August 1978. For taxable year 1978, the taxpayer deducted as a pension expense those amounts contributed to the plan [p. 8] from September 1978 through December 1978 and, additionally, those amounts contributed to the plan from January 1979 through August 1979.

ADM-D. TAM 8543002 applied Revenue Ruling 76-28 and concluded that the taxpayer was "entitled to claim a deduction" for throwback contributions to the defined benefit plan because they were made "prior to the extended due date for filing the respective year's income tax returns." *Id.*

In December 1986 the Internal Revenue Service National Office issued another Technical Advice Memorandum (TAM 8714008) that applied Revenue Ruling 76-28 to multiemployer defined benefit plans. ADM-E. The taxpayer was identified in the request for technical advice as "engaged in the business of wholesale and retail grocery distribution." JNX 45. The union plan was the Central States Plan (the same multiemployer defined benefit plan involved in TAM 8210014, TAM 8303002 and here in *Airborne*). *Id.*

The taxpayer had cited both Revenue Ruling 76-28 and TAM 8210014, which the Service considered again in the context of a deduction of throwback contributions to a defined benefit plan. *See* JNX 46 & ADM-E ("makes monthly contributions" "For the taxable year ending January 29, 1982, the Employer claimed a deduction for contributions paid after the close of the [p. 9] taxable year through approximately the extended tax return filing

date of October 15, 1982"). TAM 8714008, which approved the deduction of approximately 20 months of monthly contributions to the Central States multiemployer defined benefit pension plan, summarized its rationale as:

> In this case, the Employer, for the first time, claimed a deduction for contributions made after the close of the taxable year, but prior to the date the return was filed. Section 404(a)(6) of the Code provides statutory authority for this deduction. Since the deduction was claimed on the corporate tax return for the applicable taxable year, the contributions are deemed made *on account of that year* pursuant to the requirements of Rev. Rul. 76-28. This deduction does not constitute a change in the Employer's accounting method in violation of section 1.404-14(c) of the regulations. Such amounts may be deducted without regard to whether they are attributable to unfunded past service liability incurred during the prior taxable year. The total amount that may be deducted, however, is limited by the dollar amount determined under section 404(a)(1)(A) of the Code.

ADM-E (italics supplied).

Airborne obtained an extension of time to file its 1989 federal tax return and timely filed its return in September 1990. Airborne claimed deductions for throwback contributions to multiemployer defined benefit plans, including the Western Conference Plan (a plan involved in TAM 8210014) and the Central [p. 10] States Plan (a plan involved in each of TAM 8210014, TAM 8303002 and TAM 8714008 issued by the Internal Revenue Service National Office).

Revenue Ruling 76-28 has been in effect for more than twenty years. It remains in effect today.

(iv) The IRS's application of section 413(b)(7) and Revenue Ruling 76-28 to multiemployer defined benefit plans

Section 413(b)(7), enacted as part of ERISA in 1974, mandates that "[e]ach applicable limitation provided by section 404(a) shall be determined as if all participants in the plan were employed by a single employer." Since enacted in ERISA (with retroactive application to 1953), the limitation on an employer's deductions of contributions to a multiemployer defined benefit pension plan has been a single plan-wide limitation.

The Internal Revenue Service's own publications have confirmed the existence of a single planwide limitation for multiemployer plans. Since at least February 1981, its Examination Guidelines Handbook has explained section 413(b)(7) as follows:

> Deductions
>
> *All* applicable limitations under IRC 404(a) *must* be determined as though all participants in the plan were employed by a single employer. The amount contributed by each employer party to the agreement will be considered [p. 11] within those deductible limits *if* the *sum* of anticipated employer contributions by *all* employers party to the collective bargaining agreement (determined in a manner consistent with the manner that actual contributions are made) does not exceed the annual limitation. If amounts do exceed that limitation, the allocation of a deduction among the various

> employers will be in a method to be prescribed by regulations.

ADM-H (italics supplied). Congress authorized the Service to prescribe by regulation the treatment of deductions that exceeded the annual limitation. It has not promulgated or proposed any such regulations.

IV. SUMMARY OF ARGUMENT OF *AMICI CURIAE*

The ability to make and deduct contributions to retirement plans up to 8½ months after year end is a matter of business routine in corporate America. Employers have long been permitted to decide when to make and deduct contributions. They have been allowed to balance cash needs, taxable income and employee relations in making that decision. The government now proposes to take this flexibility away from unionized employers notwithstanding a congressional history that reflects care not to disadvantage unionized employers.

* * *

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 15, 1997

Direct Dial
(415) 773-5787

VIA FACSIMILE AND U.S. MAIL

Steven W. Parks, Esq.
Appellate Section
Department of Justice, Tax Division
P.O. Box 502
Washington, D.C. 20044

Re: Airborne Freight Corp. v. United States
(Ninth Circuit Docket No. 97-35129)

Dear Mr. Parks:

Thank you for your faxed letter dated September 15.

By now you have probably received my previously drafted follow-up letter to my voicemail message. Regarding the sequence of events, you may now recall after reviewing the letter that (i) I requested the withdrawal, (ii) you checked and called me back that same afternoon declining to withdraw, (iii) during the second conversation you said that you would reconsider after receiving something in writing, and (iv) my written response was thereafter filed.

You now state in your letter dated September 15 that "any submission made will be duly considered," but it appears to me that you have not even begun to consider the responsive submission that I previously served and filed. Should I assume that you *have* or that you *have not* already considered each of the points and each of the authorities in our previously filed response? Wholly

apart from our telephone conversations, I would have expected my written response to your objections to have prompted a reconsideration. If it did not, *please reconsider now.*

I still would appreciate your returning my call. I believe that your apparent analysis is wrong. Perhaps you will provide me the opportunity to continue the discussion we began approximately 12 weeks ago.

Whatever the status of your review, please give serious consideration to the points we raised. I had hoped that some time to reflect would have produced your voluntary withdrawal by now. I would be happy to discuss other authorities with you.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

REVH:bem
Enclosure

U.S. Department of Justice

Tax Division

PLEASE REPLY TO: P.O. Box 502
Washington, D.C. 20044

[SEAL]
Tel. No. (202) 514-3361
Fax No. (202) 514-8456

SParks
5-82-9057
CMN 9569087

September 16, 1997

FACSIMILE
Richard E.V. Harris, Esquire
Orrick, Herrington & Sutcliffe, LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-2143

Re: Airborne Freight Corp. v. United States
(9th Cir. No. 97-35129)

Dear Mr. Harris:

This responds to the two facsimile transmissions you sent to me yesterday. These matters have now been addressed twice by this office. Nothing in your facsimile transmissions yesterday changes our position. Please be advised further that, in accordance with Section 6103, this office simply is not in a position to seek or obtain information from the IRS concerning the federal income tax liabilities of third-party taxpayers named by you. Accordingly, absent any new information or authorities you may

wish to present us in writing, we consider the matter one for resolution by the court of appeals.

Sincerely yours,

/s/ Steven W. Parks
STEVEN W. PARKS
Attorney
Appellate Section

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 17, 1997

Direct Dial
(415) 773-5787

BY FAX AND BY MAIL

Steven W. Parks, Esq.
U.S. Department of Justice
Tax Division
Appellate Section
P.O. Box 502
Washington, D.C. 20044

Re: *Airborne Freight Corp. v. United States*
(9th Circuit No. 97-35129)
Followup to your faxed letter of September 16

Dear Mr. Parks:

Your letter of September 16 states: "These matters have now been addressed twice by this office." Who is included within "this office" as you have used the expression in your letter? Anyone besides you and perhaps Mr. Greene?

Thank you for your prompt attention to my request.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 17, 1997

Direct Dial
(415) 773-5787

BY FAX AND BY MAIL

Steven W. Parks, Esq.
U.S. Department of Justice
Tax Division
Appellate Section
P.O. Box 502
Washington, D.C. 20044

Re: *Airborne Freight Corp. v. United States*
(9th Circuit No. 97-35129)
The adequacy of review by
"this office" of the DOJ

Dear Mr. Parks:

Following up on my brief note earlier today:

Your opposition to our request for judicial notice used language apparently designed to suggest or create the impression that the points on which judicial notice was requested were merely "allegations" and, by implication, *not actually true, See, e.g.*, Govt. Oppos. to Judicial Notice, pp. 4-5 ("no basis for allowing", "new allegations of fact", "such allegations", "various allegations of fact", "the declaration contains numerous hearsay statements", "alleged facts of which counsel was 'informed' ").

Did you and your colleagues in your "office" actually ask yourselves and ask the Internal Revenue Service:

1. Does the government have any *factual basis* on which to assert or even to suggest to the Ninth Circuit Court of Appeals that the following "rulings attached to the motion" – TAM 82100014, TAM 8303002 and TAM 8714008 – did *not* in fact involve multiemployer defined benefit plans?

2. Does the government have any *factual basis* on which to assert or even to suggest to the Ninth Circuit Court of Appeals that the following rulings "attached to the motion" – TAM 8210014, TAM 8303002 and TAM 8714008 – did *not* in fact involve one or more of the very same multiemployer defined benefit plans to which Airborne Freight made contributions?

3. What are our professional obligations as government attorneys with respect to requests for judicial notice of facts that we know to be true?

4. What are our professional obligations as government attorneys with respect to requests for judicial notice of facts that we believe to be true?

5. What are our professional obligations as government attorneys with respect to requests for judicial notice of facts that we have no reason to believe are not true?

6. What are our professional obligations as government attorneys with respect to requests for judicial notice of facts regarding past actions of a governmental agency?

7. What is the policy of the Tax Division of the Department of Justice with respect to opposing requests for judicial notice of facts known to be true?

If you did not ask those questions *prior* to filing your objections to the request for judicial notice, I believe that you certainly should have asked them after our June 20 conversation, after receiving our June 25 response, after

receiving my recent voicemail and after receiving my correspondence earlier this week.

Each of the TAMs (TAM 8210014, TAM 8303002 and TAM 8714008) did actually involve multiemployer defined benefit plans. And, each of the TAMs did actually involve one or more of the multiemployer defined benefit plans at issue in *Airborne*. **We both know that there is no real factual dispute here about these points.**

Based on your responses on June 20 regarding the points on which we have asked for judicial notice, it seemed readily apparent to me that you have no genuine basis for contesting the accuracy of *any* of the points on which judicial notice was being requested.

I do hope that you and the others in your "office" will give serious consideration to withdrawing your opposition to our requests for judicial notice. The position that you have taken in opposing our request (and in opposing our brief) is unworthy of the Tax Division.

Please reconsider the position that you have taken. If you want to discuss appropriate ways to withdraw your opposition, please give me a call.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

APPENDIX N

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 22, 1997

Direct Dial
(415) 773-5787

BY FAX AND BY MAIL
Steven W. Parks, Esq.
U.S. Department of Justice
Tax Division
Appellate Section
P.O. Box 502
Washington, D.C. 20044

Re: *Airborne Freight Corp. v. United States,*
(9th Circuit. No. 97-35129)
The § 6103 excuse in your letter of September 16

Dear Mr. Parks:

Thank you again for your response of September 16. I had hoped to discuss these matters with you by phone, personally and more informally, as we began to do on June 20. But apparently you are going to continue to refuse to return my telephone call and insist on formal written communications.

If I am wrong about your refusal, please call me. I would prefer to speak directly with you.

Your faxed letter dated September 16, 1997 contained the following statement:

> "Please be advised further that, in accordance with Section 6103, this office simply is not in a position to seek or to obtain information from the IRS concerning the federal income tax liabilities of third-party taxpayers named by you."

The above statement from your letter is simply not responsive to the questions I personally raised with you by telephone on June 20. Nor is it responsive to the issues now confronting you. It does, however, suggest again that you actually made no factual investigation of any kind before filing your opposition.

May I suggest that you consider the following?

The information set forth in my sworn declaration and in the exhibits was itself enough for you to conclude that the points on which judicial notice was being requested were valid. Moreover, the information was certainly enough for you to conclude that, professionally, you should not file an opposition suggesting, either directly or indirectly, that the factual points were not true.

If, despite the information in my declaration, you had any real, good faith doubts, there certainly were (and still are) avenues available to you. If you still have not made an appropriate investigation, you should do so immediately.

Does Section 6103 prohibit you – or an appropriate Tax Division representative or even an IRS representative – from obtaining sufficient access to the background files for the TAMs to permit you to determine whether you

can ethically suggest to the Ninth Circuit – even indirectly – that the points on which judicial notice has been requested are not true? No.

There were (and still are) many ways for you to satisfy your ethical obligations. For example (and it is merely one example), does Section 6103 prohibit the Tax Division from obtaining what a member of the public could obtain under FOIA or Section 6110? No, of course not. And, if you or some other appropriate representative of the Tax Division or the Department had asked the IRS for equivalent information – if you really did not actually do so already – you would have obtained considerable, independent corroboration of the information set forth in my declaration.

At the minimum, you would have obtained more than sufficient information to alert you to the ethical ramifications of your opposition to our request generally and your opposition to the particular points on which we sought judicial notice.

For example, your review of *only so much of the background files for TAM 8210014 as had already been released by the IRS* would have allowed you to confirm for yourself – personally and independently of my declaration – that

(i) Exhibit K attached to my declaration is genuine;

(ii) Exhibit L attached to my declaration is genuine;

(iii) the plans were indeed multiemployer plans, and the contributions were being made "under terms of three separate collective bargaining agreements;" and

(iv) the plans were indeed both defined benefit plans and teamster plans.

If you did have any doubts about my declaration, with information available to the public you could even have compared and independently confirmed for yourself not only the general contents of Exhibits K and L, but also the type fonts, the spacing, the punctuation, and the pagination used on the exhibits.

The idea that the IRS had already properly revealed information through administrative processes regarding these multiemployer TAMs was also suggested by the very first page of Exhibit P (JNX 43), which is a 1988 IRS "Notice of Intention to Disclose" for TAM 8714008, the TAM issued by the IRS to the taxpayer on December 17, 1986.

The multiemployer nature of the plans is also reflected again and again on the redacted copy of the memorandum previously released by the IRS relating to TAM 8714008. Even the redacted copy released by the IRS expressly identifies the Central States plan, one of the very same plans involved in *Airborne*. For example:

(i) The redacted copy released by the IRS shows *on its face* that the multiemployer defined benefit plan was the "Central States Southeast and Southwest Areas Pension Fund (Central States)." *See* JNX 45. The same page of the redacted copy released by the IRS twice more refers expressly to the "Central States Pension Plan."

(ii) On JNX 45, there are also references to "DEDUCTIONS FOR CONTRIBUTIONS

TO UNION PENSION PLAN," "union affiliated," "bargaining agreement," and "collective bargaining agreement."

(iii) On JNX 46, there is another reference to "DEDUCTIONS FOR CONTRIBUTIONS TO UNION PENSION PLAN."

(iv) On JNX 47, there is another reference to "DEDUCTIONS FOR CONTRIBUTIONS TO UNION PENSION PLAN" plus another express reference to "the Central States Pension Plan."

(v) On JNX 48 there is another reference to "DEDUCTIONS FOR CONTRIBUTIONS TO UNION PENSION PLAN."

(vi) On JNX 49, there is yet another reference to "DEDUCTIONS FOR CONTRIBUTIONS TO UNION PENSION PLAN" and another reference to the "Central States Pension Plan" as expressly being "of the multiemployer type."

(vii) On JNX 50 there is another reference to "DEDUCTIONS FOR CONTRIBUTIONS TO UNION PENSION PLAN."

(viii) On JNX 51 there is another reference to "DEDUCTIONS FOR CONTRIBUTIONS TO UNION PENSION PLAN."

And, if you had any real doubts about the authenticity of Exhibit P, your review of *only so much of the background files for TAM 8714008 as had already been released by the IRS* would have allowed you to independently confirm this for yourself.

As mentioned earlier, the information set forth in my sworn declaration and in the exhibits was itself enough

for you to conclude that the points on which judicial notice was being requested were valid. At a minimum, it was enough for the Tax Division of the Department of Justice to conclude that, professionally, you should not file an opposition suggesting, either directly or indirectly, that the factual points were not true.

The Section 6103 argument behind which you and the IRS are apparently trying to hide provides no real justification under the circumstances here in *Airborne*. Simply not opposing the request for judicial notice filed by the *amici curiae* would not have been a violation of Section 6103. Even now, *simply withdrawing your opposition* would not be a violation of Section 6103.

You are opposing the taking of judicial notice of facts that the IRS knows to be true. You are also opposing the taking of judicial notice of facts that the Tax Division of the Department of Justice knows to be true.

I urge you again to review the requests and the information provided in support of the requests. If you have any real doubts about the factual accuracy of *any* of the points on which judicial notice has been requested, please give me a call.

Perhaps you might consult your ethics and professional responsibility manual. I believe that you even have an electronic version readily available to you personally. You might also find your notes and materials from the appellate training sessions helpful.

Upon your further reflection, I believe that you will inform the Ninth Circuit that the documents attached to my declaration are genuine and that the facts of which

judicial notice has been requested are true. Informing the Ninth Circuit clearly – earlier rather than later – would be the most appropriate course. Please give this subject the proper reflection and consideration that it deserves.

Thank you for your prompt attention to my request.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

[SEAL]

U.S. Department of Justice

Tax Division

PLEASE REPLY TO: P.O. Box 502
Washington,
D.C. 20044

Tel No. (202) 514-3361
Fax No. (202) 514-8456

SParks
5-82-9057
CMN 9569087

September 24, 1997

Richard E.V. Harris, Esquire
Orrick, Herrington & Sutcliffe, LLP
Old Federal Reserve Bank Building
400 Sansome Street
San Francisco, CA 94111-2143

Re: Airborne Freight Corp. v. United States
(9th Cir. No. 97-35129)

Dear Mr. Harris:

This responds to the two facsimile transmissions you sent to me on September 17, 1997, and the facsimile transmission you sent to me on September 22, 1997. In the former two facsimiles, you inquire who within this office participated in considering your various requests, and ask whether several considerations listed by you were taken into account in reaching our decision to oppose your request for judicial notice. Please be advised that

your requests were considered in accordance with standard procedures within this office, and that the matter was reviewed by appropriate personnel in the Tax Division. In the latter facsimile, you advance several arguments as to why we should not oppose your request for judicial notice. After consideration, we adhere to our position as set forth in our opposition that we do not believe your motion is well founded, and that the motion should be denied by the court of appeals.

Sincerely yours,
/s/ Steven W. Parks
STEVEN W. PARKS
Attorney
Appellate Section

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 24, 1997

Direct Dial
(414) 773-5787

BY FAX AND BY MAIL
Steven W. Parks, Esq.
U.S. Department of Justice
Tax Division
Appellate Section
P.O. Box 502
Washington, D.C. 20044

Re: *Airborne Freight Corp. v. United States,*
(9th Circuit No. 97-35129)
Renewed request for withdrawal of
DOJ Objection to brief of *amici curiae*

Dear Mr. Parks:

Your objection to the filing of our *amici curiae* brief was expressly based on the assertion that the brief was based, in part, on materials that were "not part of the record on appeal."

Based on this objection, you changed your position (from not opposing the motion to file the brief to actively opposing the motion). In my conversation with you on June 20 and again in our response, we pointed out that your "outside the record" objection was not meritorious.

If you actually believed your objection to be meritorious when made, you should realize by now that it is not meritorious. The authorities cited in our June 25 response should be sufficient for you to confirm this

point. *See, e.g.*, pages 3-5, and, in particular, the authorities in footnote 2. (A copy is attached for your convenience.)

Further following up on my letters dated September 15, 1997, and my prior request during our June 20 telephone conversations, I ask again: Is any factual statement in the "Statement of Facts" in our brief a statement that you actually believe – with or without a factual basis for the belief – to be in error? To date, you have not identified any statement in our brief that (i) is inaccurate, or (ii) you you [sic] even think might be inaccurate.

I respectfully submit that you, your superiors and the Tax Division of the Department of Justice should promptly withdraw your objection to our *amici* brief. You did not oppose the other *amicus* brief and you should not continue to oppose ours. Whatever the reason for having done so initially, no reason worthy of Tax Division remains to oppose its filing.

Thank you for your prompt reconsideration of your opposition to the filing of our brief.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

[Attachment]

No. 97-35129

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIRBORNE FREIGHT CORPORATION

Plaintiff-Appellee

v.

UNITED STATES OF AMERICA,

Defendant-Appellant

ON APPEAL FROM THE JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

Response Of The *Amici Curiae* To
The Government's Opposition To Their Brief
And To
The Government's Opposition To Their
Request For Judicial Notice

(Filed Jun. 26, 1997)

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Amici Curiae
California Chamber of Commerce
California Grocers Association
California Retailers Association
Food Employers Council, Inc.
The Food Marketing Institute
National Coordinating Council for Multiemployer Plans
Oregon Grocery Industry Association
Washington Retail Association

* * *

[p. 3] The lack of a government denial provides further support for the *amici's* request for judicial notice. The government, however, should voluntarily inform the Court that each of the foregoing is true.

II.

The Government's Objections To Judicial Notice Are Meritless

a. The "Outside The Record" Objection Ignores The Nature Of Judicial Notice

Appellate courts may and frequently do take judicial notice of government publications, government statements, and government communications, particularly when judicial notice is requested by non-government

persons. Judicial notice may properly be taken by an appellate court. The United States Supreme Court's long-standing use of judicial notice is illustrative.[1]

The nature of governmental action makes judicial notice a particularly useful vehicle. Moreover, the rules relating to judicial procedure, and the law of judicial notice, provide ample opportunity for the government agency to object to particular matter if the requested judicial notice is not accurate.

[p. 4] The government's entire "outside the record" objection ignores the basic law of judicial notice, and under the circumstances is no objection at all. Where the record is false or incomplete, judicial notice is an important tool to interpret, correct or supplement the record to aid judicial administration and to help assure a just result. The "record" may be viewed in any of several ways: As automatically containing judicially noticeable facts; or as being supplemented by judicial notice; or as simply being subject to the judicially noticeable truth. However viewed, the fundamental propriety of the *amici's* request for judicial notice is beyond question. In its objection, the government has misconstrued the nature

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[1] *See, e.g., Tampa Electric Co. v. Nashville Co.*, 365 U.S. 320, 81 S.Ct. 623, 630-631 (1961); *United States v. Penn Foundry & Mfg. Co.*, 337 U.S. 198, 69 S.Ct. 1009 (1949); *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 319-322 (1943); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 455 (1941); *Texas & Pacific Ry. v. Pottorff*, 291 U.S. 245, 54 S.Ct. 415, 417 (1934); *Arizona v. California*, 283 U.S. 423, 452-455, 51 S.Ct. 522, 525-526 (1931).

of judicial notice, as well as the rules and longstanding practice of federal and state courts.[2]

---

[2] *See, e.g., Joseph Brandschain,* 80 T.C. 746, 753 (1983) ("Although not part of the record, we take judicial notice of . . . "). Before the Federal Rules of Evidence were adopted, courts regularly considered judicially noticeable matters in addition to evidence in the record. *See, e.g, Parker v. Brown,* 317 U.S. 341, 363, 63 S.Ct. 307, 319 (1946) ("Examination of the evidence in this case and of available data of the raisin industry . . . of which we take judicial notice. . . . "); *Westchester Fire Insurance v. Buffalo Salvage Co.,* 40 F.Supp. 378 (E.D. Mich. 1941) (Pamphlet No. 7 issued by the Bureau of Explosives: "Irrespective of the introduction of the pamphlet in evidence, the court is authorized to take judicial notice of its contents."). *See also,* Witkin, *California Evidence* (3rd Ed.), § 80, p. 74 ("Under the doctrine of judicial notice . . . introduction of evidence to prove them will not be required").

Matters are judicially noticeable even when the introduction of evidence is procedurally prohibited. *See, e.g., State of Arizona v. State of California,* 283 U.S. 423, 452, 51 S.Ct. 522, 525 (1931) ("The bill alleges. . . . It is true that . . . a motion to dismiss, like a demurrer, admits every well-pleaded allegation of fact. But a court may take judicial notice. . . . We know judicially . . . We know from the reports . . . "); *Interstate Natural Gas Co. v. Southern California Gas Co.,* 209 F.2d 380, 384 (9th Cir. 1953) (Rule 12(b)(6) motion "admits all well-pleaded facts, but does not admit facts which court will judicially notice as not being true . . . ").

Matters may be judicially noticed on appeal, long after the trial court's "record" has been closed and after the trial court has lost jurisdiction. *See Southern Pacific Co. v. Lipman,* 148 Cal. 480, 491 (1906) (judicial notice taken of letter written by non-party subsequent to trial court's denial of plaintiff's new trial motion; letter filed in appellate court upon oral argument; letter considered in interpreting meaning of a statement in an opinion considered by trial court); Weiner, *Effective Appellate Advocacy,* 161 ("It is permissible to go outside the record in these instances: (i) as to anything in the realm of judicial notice . . . ").

[p. 5] **b. The "It's Too Late" Objection Ignores The Law Of Judicial Notice**

The government's "it's too late" objection – that it is too late to present the truth about the actual practice of the IRS and its National Office – is also meritless. *See, e.g.*, Fed. R. Evid., Rule 201(f) ("Judicial notice may be taken at any stage of the proceeding") & Advisory Committee Note (" . . . at any stage whether in the trial court or on appeal"). In addition to implicitly suggesting, inaccurately, that appellate courts may not take judicial notice of a government agency's publications, statements and actions, the objection ignores the obvious fact that *amici* did not participate in the trial court proceedings and,

* * *

ORRICK, HERRINGTON
& SUTCLIFFE LLP

September 26, 1997

Direct Dial
(415) 773-5787

Steven Parks, Esq.
U.S. Department of Justice
Tax Division
Appellate Section
P. O. Box 502
Washington, D.C. 20044

Re: *Airborne Freight Corp. v. United States* (9th Circuit No. 97-35129) Renewed request for withdrawal of DOJ objection to brief of *amici curiae*

Dear Mr. Parks:

I called you trying to follow up on our June 20 telephone conversations and my June 25 written response to your objections. Instead of returning my September call, you wrote me to confirm your refusal to withdraw the government's opposition to the *amici curiae* brief and to the *amici curiae* request for judicial notice. (As you will recall, the taxpayer-appellee expressly joined in our request for judicial notice subsequently.)

Your continued insistence upon written communications and your refusal to return my call has forced me to write you several times about this matter. I would have preferred less formal communication, where I could attempt to persuade you of your professional responsibilities in this matter and the inappropriateness of the

government's continued efforts to keep from the court the true facts regarding the IRS' conduct.

You should promptly withdraw your opposition to our brief and to our request for judicial notice. Given the positions the government has already taken, you should also expressly confirm that the facts of which judicial notice was requested are true. You know that they are true. The IRS knows that they are true.

Your delay in coming to grips with this problem continues to burden the appeal and impede the efficiency of the judicial process. The court should not have to spend its resources unnecessarily to review your opposition and confirm the truth of the judicially noticeable facts.

This problem will not go away. At some point you will have to confess the truth. Please don't continue to ignore it.

Attached for your consideration are the following: (a)Ryan, "Court Punishes Attorney for Oral Advocacy," 21 *Litigation News* (March 1996) and (b) "Statement of Principles of Internal Revenue Tax Administration."

Please give this matter and our requests that you withdraw your opposition the serious consideration that they deserve.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

REVH:ksk

[Attachment]

LITIGATION NEWS MARCH 1996 VOL. 21, NO. 3

Court Punishes Attorney for Oral Advocacy

Rule 11 sanctions not confined to written materials

By Joseph W. Ryan, Jr.
LITIGATION NEWS ASSOCIATE EDITOR

An angry federal judge has imposed a Rule 11 sanction based on oral representations of counsel made during argument, which the judge found to be without evidentiary support and not in good faith.

In *O'Brien v. Alexander,* 898 F.Supp. 162 (S.D.N.Y. 1995), District Judge Denny Chin granted a motion for Rule 11 sanctions which were sought "only with respect to statements made during oral argument." When the sanctioned counsel contended that Rule 11 may not be used as a punishment for "oral advocacy," the court noted similar statements in the underlying pleadings and stated that counsel was reaffirming representations made in his papers previously filed with the court. Judge Chin noted, "as a matter of common sense, Rule 11 ought to apply to oral advocacy at least where an attorney is advocating a pleading, written motion or other papers signed by the attorney." At least one other court has followed similar reasoning with regard to bankruptcy sanctions. *See Kouterick v. Midlantic National Bank,* 29 Fed. R. Serv. 3d 356 (U.S. Bankruptcy Ct. N.J. 1994).

"When (during oral argument) a lawyer maintains and adheres to statements which have already been highlighted in his pleadings to be problematic, he will indeed risk sanctions."

Paul Kalish, Washington, DC, Co-Chair of the Section of Litigation's Pretrial Practice and Discovery Committee, points out that under the 1993 amendments to Rule 11, sanctions for statements made in oral arguments are appropriate. "While this will be a rare occurrence," says Kalish, "if a pleading were filed and an attorney advocated it, that certainly would be sufficient for the imposition of Rule 11 sanctions. The 1993 amendment states that the rule applies to papers filed with or presented to the court. This would surely cover that circumstance."

The courts' focus on oral advocacy suggests to Gene E.K. Pratter, Philadelphia, Co-Chair of the Section's Ethics and Professionalism Committee, that counsel must maintain their professional objectivity even in the midst of heated argument.

"I would expect that in the absence of a deliberate attempt to mislead the court," says Pratter, "most judges will recognize the ardor of the moment and tend to be lenient with counsel. However, when a lawyer maintains and adheres to statements which have already been highlighted in his pleadings to be problematic, he will indeed risk sanctions." The solution, according to Pratter, is for counsel to be thoughtful and to be prepared in their oral presentations. "We as lawyers have professional obligations to the court to be thoughtful and truthful," says Pratter. "These decisions are an indication of the return of

many courts to the high demands of propriety even during spirited oral advocacy. The promotion of mutual respect is clearly at work here," she continued, "and as lawyers we need to be more attuned to the courts' concerns and to engage the judges on a professional basis, as opposed to reacting with passionate assertions which may not be true."

The *O'Brien* and *Kouterick* decisions each suggests that the judges were particularly angered by misrepresentations by counsel uttered directly to the court. The fact that the statements were made in oral argument gave the judges little pause. For example, in *Kouterick* the court rejected arguments from counsel that he was under a great amount of pressure during oral argument. United States Bankruptcy Judge Steven A. Stripp (D.N.J.) stated that counsel's "demeanor at oral argument was cool, poised, and aggressive . . . he stood up very well in the court's questioning at that hearing."

While sanctions under Rule 11 will continue to be imposed for statements made in a pleading that lack evidentiary foundation or which have not been fully investigated by counsel, it is certain that statements made directly to a court during oral advocacy have flash-point potential. As Judge Stripp observed "it is very disturbing that he [counsel] was able to look me in the eye and lie with such ease . . . "*Kouterick* at 367. Counsel who fail to heed such warnings, and who take a cavalier approach to oral statements during arguments to the court, may literally find themselves paying for their lack of candor.

MISSION OF THE SERVICE

The purpose of the Internal Revenue Service is to collect the proper amount of tax revenue at the least cost; serve the public by continually improving the quality of our products and services; and perform in a manner warranting the highest degree of public confidence in our integrity, efficiency and fairness.

Statement of Principles of Internal Revenue Tax Administration

The function of the Internal Revenue Service is to administer the Internal Revenue Code. Tax policy for raising revenue is determined by Congress.

With this in mind, it is the duty of the Service to carry out that policy by correctly applying the laws enacted by Congress; to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view.

At the heart of administration is interpretation of the Code. It is the responsibility of each person in the Service, charged with the duty of interpreting the law, to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he or she is "protecting the revenue." The revenue is properly protected only when we ascertain and apply the true meaning of the statute.

The Service also has the responsibility of applying and administering the law in a reasonable, practical manner. Issues should only be raised by examining officers when they have merit, never arbitrarily or for trading purposes. At the same time, the examining officer should never hesitate to raise a meritorious issue. It is also important that care be exercised not to raise an issue or to ask a court to adopt a position inconsistent with an established Service position.

Administration should be both reasonable and vigorous. It should be conducted with as little delay as possible and with great courtesy and considerateness. It should never try to overreach, and should be reasonable within the bounds of law and sound administration. It should, however, be vigorous in requiring compliance with law and it should be relentless in its attack on unreal tax devices and fraud.

APPENDIX O

ORRICK, HERRINGTON
& SUTCLIFFE LLP

March 10, 1998

Direct Dial
(415) 773-5787

BY FAX

Steven W. Parks, Esq.
Appellate Section
U.S. Department of Justice
Tax Division
P. O. Box 502
Washington, D.C. 20044

Kenneth L. Greene, Esq.
Appellate Section
U.S. Department of Justice
Tax Division
P. O. Box 502
Washington, D.C. 20044

Re: *Airborne Freight Corp. v. United States*, (9th Circuit, No. 97-35129)

Dear Messrs. Parks and Greene:

Following up on my letter of September 26, 1997, to Mr. Parks, to which you never replied, I urge you again to inform the Court *prior to argument* of the facts that you know to be true. Your time to do the right thing – before outside intervention – is rapidly evaporating. At the very minimum, you should inform the Court in writing prior to argument that:

(1) TAMs 8210014, 8303002, and 8714008 each involved one or more of the very same

multiemployer plans involved in *Airborne* (as well as in *Lucky*).

(2) The IRS has applied Revenue Ruling 76-28 to multiemployer plans.

(3) Certain government factual statements to the Tax Court in *Lucky* and *American Stores* regarding the TAMs and the Revenue Ruling were not accurate.

Your continued failure to correct the government's misstatements and your continued efforts to keep the true, indisputable facts from the Courts ensure that, regardless of what happens in the Courts, this issue will not go away.

I have given you and your colleagues considerable time to reflect on this matter and to consult with others regarding the unfortunate path that your predecessors selected and you have chosen to continue following. I personally brought this to Mr. Parks' attention during our June 20 telephone conversations. *Please reconsider what you are doing.* Whatever might be expected from the IRS, this conduct is not worthy of the Department of Justice.

Very truly yours,

/s/ Richard E.V. Harris
Richard E.V. Harris

REVH:ksk

cc: Gary R. Allen, Esq.
U.S. Department of Justice
Chief – Appellate Section
Tax Division
P. O. Box 502
Washington, D.C. 20044

APPENDIX P

[LOGO]

U.S. Department of Justice

Tax Division

Please reply to: *Appellate Section*
P.O. Box 502
Washington, D.C.
20044

Facsimile No. (202) 514-8456
Telephone No. (202) 514-3361

SWParks
5-82-9057; 5-20293
CMN 9569087; 9730230

March 20, 1998

FEDERAL EXPRESS
Cathy A. Catterson, Esquire
Clerk, U. S. Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: Airborne Freight Corp. v. United States
(9th Cir. No. 97-35129)
Lucky Stores, Inc. and Subsidiaries
v. Commissioner
(9th Cir. No. 97-70810)

Dear Mr. [sic] Catterson:

The above-entitled cases were orally argued on March 12, 1998. Prior thereto, a request seeking judicial notice of various facts was filed in Lucky Stores that was joined in by the taxpayer in Airborne Freight Corp., and

which the Government opposed. That motion remains pending in these cases. Counsel for Lucky Stores has requested that we make certain inquiries of the IRS regarding matters addressed in that motion, and that we advise the Court regarding these matters. While we believe that these matters have been thoroughly dealt with in our prior submissions, and that, contrary to the suggestion of opposing counsel's letter of March 10, 1998 (a copy of which is attached), we are under an ethical obligation to comply with his demands, we are nevertheless submitting this letter to the Court to remove any doubt as to whether we are disputing the correctness of certain of taxpayer's allegations regarding the facts underlying three Technical Advice Memoranda (TAMs) on which they have relied, or that the material submitted with the motions for judicial notice in the Tax Court and in this Court would appear to show that certain statements made by counsel for the Commissioner on brief in the Tax Court in Lucky Stores regarding the facts underlying those TAMs were incorrect.

At the outset, we wish to emphasize that we adhere to the contentions made in our opposition to the request for judicial notice, and that we continue to contest whether taxpayers have made a valid case for invoking judicial notice. That having been said, we note that taxpayers request judicial notice that three technical advice memoranda, TAM 8210014, TAM 8303002 and TAM 8714008, involved collectively bargained, multi-employer plans. In that regard, taxpayers also point out in their opening brief on appeal (at 14-15) that the Commissioner's trial counsel in Lucky Stores stated on brief in

the Tax Court that only one of these TAMs (TAM 8210014) may have involved a multi-employer plan.

Significantly, only TAM 8210014 states on its face that it involved a collectively bargained plan, and the Commissioner's trial counsel correctly pointed that out to the Tax Court. The remaining two TAMs do not state or otherwise indicate on their face that they involved collectively bargained plans, and none of the three TAMs state on their face that the plans involved were multi-employer plans.

Nevertheless, we acknowledge that it appears from certain of the documents of which taxpayers have requested that this Court take judicial notice that all three TAMs involved collectively bargained, multi-employer plans. Indeed, we have not asserted otherwise on these appeals, though we continue to believe that Section 6103 of the Internal Revenue Code would prevent us from obtaining or disclosing information from the IRS's files that would specifically confirm or deny the point. Nevertheless, based on taxpayer's submissions (the bulk of which had also been presented to the Tax Court), it would appear that statements to the contrary made by counsel for the Commissioner on brief to the Tax Court in Lucky Stores were incorrect. Accordingly, notwithstanding that the TAMs do not so state, based upon the documents produced by taxpayers, we do not dispute the assertion that all three TAMs involved collectively bargained, multi-employer plans.

Our contentions concerning the role of the TAMs to the proper resolution of these cases are set forth in our briefs in Lucky Stores at 41-47, and in our reply brief in

Airborne Freight at 5-10. Our arguments, as set forth therein, are in no way altered based on the fact that three, rather than one, of the TAMs cited by taxpayers apparently involved collectively bargained, multi-employer plans.

We are enclosing the original and four copies of this letter for distribution to the panel who heard oral argument in these cases. These cases are currently assigned to the undersigned attorney, who may be reached at (202) 514-2958.

Sincerely yours,

/s/ Steven W. Parks
STEVEN W. PARKS
Attorney
Appellate Section

cc: Paul J. Sax, Esquire
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